VOLUME XVII. NUMBER 2.

Massachusetts Law Quarterly

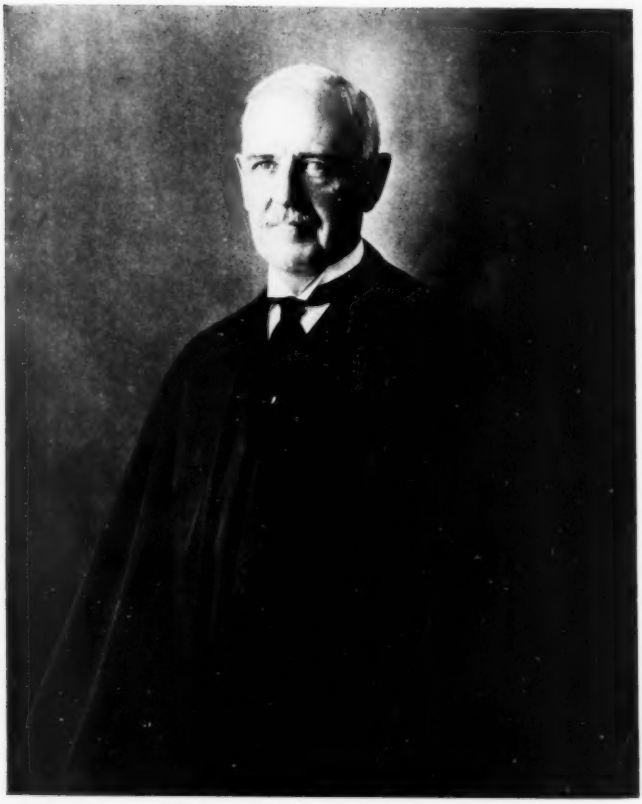
FEBRUARY, 1932 (and Supplement)

CONTENTS

CONTENTS OF SUPPLEMENT

Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

Entered as Second-Class Matter at the Post Office at Boston.



JAMES BERNARD CARROLL

Associate Justice Supreme Judicial Court, 1915–1932

"It is very seldom that the gloom of death casts a pall so widespread over the community as it has today. It is not often that the death of a man causes so many hearts to be tried. A real and universal feeling of sympathy permeates the entire community.

"The passing of the Hon. James B. Carroll not only is a bereavement to the members of his family and his relatives, but in his death Springfield is deprived of one of its foremost citizens, the State of Massachusetts mourns the passing of a distinguished official who served it well and ably for many years.

"The Catholic Church in Springfield lost its best known and most respected layman."

(From Bishop Leary's Eulogy delivered after the funeral services for Judge Carroll, Jan. 11, 1932.)

MASSACHUSETTS BAR ASSOCIATION

OFFICERS AND COMMITTEES FOR THE YEAR 1931–1932.

President.

FREDERICK N. WIER,
Sun Building, Lowell.

Vice-President.

FREDERICK LAWTON,
Boston.

Treasurer.

HORACE E. ALLEN,
Third National Bank Building, Springfield.

Secretary.

FRANK W. GRINNELL,
60 State St., Boston.

Assistant Secretary.

DUNBAR F. CARPENTER,
50 State St., Boston.

Members of the Executive Committee.

NATHAN P. AVERY,	Holyoke.
JAY R. BENTON,	Belmont.
NORMAN W. BINGHAM,	Newton.
CARL M. BLAIR,	Worcester.
JOHN G. BRACKETT,	Arlington.
FREDERIC H. CHASE,	Concord.
MICHAEL L. EISNER,	Pittsfield.
ELIAS FIELD,	Boston.
TIMOTHY M. HAYES,	Greenfield.
WILLIAM HAROLD HITCHCOCK,	Dedham.
OWEN A. HOBAN,	Gardner.
SYBIL H. HOLMES,	Brookline.
J. HOWARD JONES,	Springfield.
JOHN P. KANE,	Lawrence.
MOSES S. LOURIE,	Brookline.
HARRY D. LINSCOTT,	Lynn.
EDWARD A. MACMASTER,	Bridgewater.
JOHN M. MERRIAM,	Framingham.
WELD A. ROLLINS,	Needham.
ALFRED R. SHRIGLEY,	Hingham.
SUMNER Y. WHEELER,	Salem.

The President, the Retiring President, Frederick W. Mansfield, the Secretary and the Treasurer are members of the Executive Committee, *ex officio.*

(Other committees will be found on the next page.)

Committee on Legislation.

ARTHUR D. HILL, *Chairman*, Boston.

DUNBAR F. CARPENTER,	Winchester.	ARTHUR J. SANTRY,	Brookline.
THEODORE EATON,	Wakefield.	ALFRED R. SHRIGLEY,	Hingham.
GEORGE A. GASKILL,	Worcester.	ROMNEY SPRING,	Boston.
ARTHUR P. HARDY,	Malden.	GEORGE F. MCKELLEGET,	Cambridge.
OWEN A. HOBAN,	Gardner.	ARTHUR H. WELLMAN,	Topsfield.
GRANT M. PALMER,	Waltham.	CHARLES J. WESTON,	Springfield.

Committee on Judicial Appointments.

DAMON E. HALL, *Chairman*, Belmont.

HAROLD S. R. BUFFINTON,	Fall River.	JAMES C. REILLY,	Lowell.
HUGH P. DRYSDALE,	North Adams.	JAMES W. SULLIVAN,	Lynn.
WILLIAM G. MCKECHNIE,	Springfield.	MICHAEL A. SULLIVAN,	Lawrence.
		CHARLES M. THAYER,	Worcester.
		HENRY A. WYMAN,	Boston.

Committee on Grievances.

STOUGHTON BELL, *Chairman*, Cambridge.
PARK CARPENTER, *Secretary*, 10 State Street, Boston.

EDWARD FISCHER,	Holliston.	WALTER S. PINKHAM,	Quincy.
WILLIAM E. FULLER,	Fall River.	PHILIP RUBENSTEIN,	Brookline.
RAYNOR M. GARDINER,	Boston.	BENNETT SANDERSON,	Cambridge.
BERT E. HOLLAND,	Boston.	LUCIUS E. THAYER,	Newton.
EDWIN G. NORMAN,	Worcester.	SUMNER Y. WHEELER,	Salem.
MARCUS MORTON, JR.,	Cambridge.	EDMUND A. WHITMAN,	Cambridge.

Committee on Membership.

J. COLBY BASSETT, *Chairman*, 30 Federal Street, Boston.

GEORGE K. BLACK,	Boston.	VERNON W. MARR,	Boston.
HERBERT B. EHRMANN,	Brookline.	CHARLES P. RYAN,	Fall River.
LINWOOD M. ERSKINE,	Worcester.	RALPH S. SPOONER,	Springfield.
THOMAS J. LANE,	Lawrence.	JAMES M. ROSENTHAL,	Pittsfield.

Committee on Legal Education.

PHILIP NICHOLS, *Chairman*, Newton.

EDWARD T. ESTY,	Worcester.	JACOB J. KAPLAN,	Boston.
ELIAS FIELD,	Boston.	GUY NEWHALL,	Lynn.

Committee on Nominations.

FREDERICK W. MANSFIELD, *Chairman*, Boston.

JAMES E. MCCONNELL,	Boston.	HEMAN A. HARDING,	Barnstable.
ADDISON B. GREEN,	Holyoke.	IRVING W. SARGENT,	Lawrence.
CHARLES MITCHELL,	New Bedford.	GEORGE H. MIRICK,	Worcester.
CARLTON T. PHELPS,	North Adams.	CHARLES M. STODDARD,	Greenfield.

Committee on Publication.

THE PRESIDENT, *Ex Officio.*		T. HOVEY GAGE,	Worcester.
GEORGE R. NUTTER,	Boston.	DUNBAR F. CARPENTER,	Winchester.

THE SECRETARY.

Special Committee on Affiliation of Bar Associations.

FRANK W. GRINNELL, *Chairman.*

JOHN G. BRACKETT.
EDWARD M. DANGEL.
ROBERT G. DODGE.
EDWARD A. MACMASTER.
RICHARD B. WALSH.
JOSEPH WIGGIN.

List of Past Presidents of the Association.

RICHARD OLNEY, of Boston, 1909–1910.
ALFRED HEMENWAY, of Boston, 1910–1911.
CHARLES W. CLIFFORD, of New Bedford, 1911–1912.
JOHN C. HAMMOND, of Northampton, 1912–1913.
MOORFIELD STOREY, of Boston, 1913–1914.
HERBERT PARKER, of Lancaster, 1914–1915.
HENRY N. SHELDON, of Boston, 1915–1916.
CHARLES E. HIBBARD, of Pittsfield, 1916–1917.
ARTHUR LORD, of Plymouth, 1917–1918.
JOHN W. CUMMINGS, of Fall River, 1918–1919.
FREDERICK P. FISH, of Brookline, 1919–1920.
EDWARD W. HUTCHINS, of Boston, 1920–1921.
ADDISON L. GREEN, of Holyoke, 1921–1922.
THOMAS HOVEY GAGE, of Worcester, 1922–1923.
THOMAS W. PROCTOR, of Newton, 1923–1924.
GEORGE L. MAYBERRY, of Waltham, 1924–1925.
FRANKLIN G. FESSENDEN, of Greenfield, 1925–1926.
ERNEST H. VAUGHAN, of Worcester, 1926–1927.
GEORGE R. NUTTER, of Boston, 1927–1928.
FREDERICK W. MANSFIELD, of Boston, 1928–1931.

OFFICERS OF THE AMERICAN BAR ASSOCIATION FOR 1931–1932.

President: GUY A. THOMPSON, St. Louis, Mo.

Secretary: WILLIAM P. MCCRACKEN, JR., 1140 North Dearborn St., Chicago, Ill.

Member of General Council for Massachusetts: FRANCIS J. CARNEY, Boston.

Vice-President for Massachusetts: THOMAS J. BOYNTON, Boston.

Other Members of Local Council for Massachusetts:

GLEASON L. ARCHER, Boston; GEORGE R. GRANT, Boston; JOHN W. MASON, Northampton; CLIFFORD A. COOK, Milford.

CONFERENCE OF BAR ASSOCIATION DELEGATES.

Chairman: PHILIP J. WICKSER, Buffalo, N. Y.
Vice-Chairman: DAVID A. SIMMONS, Houston, Texas.
Secretary: HERBERT HARLEY, Washington, D. C.

Council

ELIHU ROOT, New York City; HARRY S. KNIGHT, Sunbury, Pa.; EDWARD H. CABANISS, Birmingham, Ala.; ALFRED J. SCHWEPPE, Seattle, Wash.; CHARLES E. CLARK, New Haven, Conn.; FRANK W. GRINNELL, Boston, Mass.; ROYAL A. STONE, St. Paul, Minn.; OSCAR C. HULL, Detroit, Mich.; CHARLES A. BEARDSLEY, Oakland, Calif.; ROBERT H. JACKSON, Jamestown, New York.

Massachusetts Bar Association.

Notice of Annual Meeting, December 19, 1931.

The twenty-second annual meeting of the Massachusetts Bar Association, for consideration of reports of committees, election of officers and such other business as may come before the meeting, will be held in the Rooms of the Bar Association of the City of Boston at the Parker House in Boston, on Saturday, December 19, 1931, at 11 a. m. The report of the Committee on Nominations will be found on the back of this notice.

Luncheon will be served at 1 p. m. The meeting will be continued after luncheon. Tickets for the luncheon will not be issued. Members may order the special Blue Plate Luncheon or any other that they wish.

After the regular business, there will be opportunity for discussion.

Subjects for Discussion.

1. As the subject of closer federation or affiliation of bar associations has been under discussion for some time, in Massachusetts as well as in other states, the problem of how far it is practicable and advisable and what the best method of bringing it about is will be thrown open for discussion and suggestion from the various members, in order that the Executive Committee and the representatives of other bar associations in the commonwealth may have the benefit of such discussion and suggestions. An explanation of two plans which have been suggested and of the problems of the association and their relation to these plans will be found in the Massachusetts Law Quarterly for August, 1931, pages 31–36. It is to be hoped that the members of the association will read those five pages in order that they may understand the practical situation, and that members who are not able to attend the meeting will send to the Secretary in writing such suggestions as they may have in regard to the whole subject.

2. The seventh annual Report of the Judicial Council will be filed very shortly and reprints will be sent out as usual in the November number of the Massachusetts Law Quarterly in advance of the meeting, in order that the members may have an opportunity to discuss the recommendations contained in the report.

A Bench and Bar Night Dinner, December 14, 1931.

A Bench and Bar Night Dinner of the Bar Association of the City of Boston will take place at the Parker House in Boston, on Monday, December fourteenth, at 7 p. m. The guests of the occasion will be Guy A. Thompson, Esq., of St. Louis, President of the American Bar Association, and Hon. Ira L. Letts, of the United States District Court for Rhode Island. Members of the Massachusetts Bar Association are invited to attend this dinner. Tickets may be obtained through the undersigned by prompt application enclosing check for $3, provided the requests for tickets are received before the limited capacity of the hall is exhausted.

F. W. Grinnell, *Secretary*,
60 State Street,
Boston, Massachusetts.

December 9, 1931.

The report of the Committee on Nominations submitted the names for President, Vice-President, Treasurer, Secretary and members of the Executive Committee, of the persons who were elected. They are listed at the beginning of this pamphlet.

TWENTY-SECOND ANNUAL MEETING.

The twenty-second annual meeting of the Massachusetts Bar Association was held in the rooms of the Boston Bar Association at the Parker House in Boston, on Saturday, December 19, 1931, at 11 a. m., with about forty members present and the president, Mr. Frederick W. Mansfield, of Boston, in the chair.

The records of the last annual meeting were approved as printed in the MASSACHUSETTS LAW QUARTERLY for January, 1931.

THE PRESIDENT'S ADDRESS.

The president of the American Bar Association, Guy A. Thompson, Esq., of St. Louis, during his speech at the Bench and Bar Night of the Boston Bar Association this week said among other things that it was the duty of every lawyer to be a member of a bar association. It was his view that in no other way could a member of the bar interested in his profession and who had its welfare at heart fully discharge the obligations which membership in his profession laid upon him. And of course it is not necessary to state that that obligation is not fulfilled by the mere fact of membership. The kind of membership which Mr. Thompson had in mind was an active membership and the kind of member which he visualized was one participating in the activities of the association to which he belonged and bearing his share of the burdens and responsibilities that rest upon lawyers everywhere.

Massachusetts has her fair share of the many members of the bar in this country who seem to think that they owe no obligation whatever to their profession and who, when confronted with the proposal to join a bar association, ask themselves what they would get in return for the annual dues which they would be compelled to pay if they became members. It seems strange that it apparently never occurs to these lawyers that under that standard the consideration is moving in the wrong direction. Membership in a bar association is not offered as something commensurate in value with the annual dues which the member is required to pay. No bar association says that in return for $5.00 annual dues five dollars' worth of value will be returned. It is a fact, of course, that returns far in excess of five dollars in financial value and incalculable in professional value are received in return for the dues. But that is only by the way, merely incidental. The fact is that bar associations wish to have as many members as possible in order to obtain from the member the assistance which every lawyer can give, rather than to give him something in return for a money consideration. So, then, instead of members of the bar who do not belong to any bar association asking themselves what good it would do them to join an association, or what they would get in return for required annual dues, we, with all respect, suggest that they approach the question from the opposite angle and ask themselves if they are doing their whole duty when they are withholding from their brethren the aid which their cooperation could give.

We have now in the Massachusetts Bar Association about 1,000 members. It is unnecessary of course to urge upon our members the advisability of membership. We may take judicial notice of the fact that the very status of being members shows that they approve of membership—otherwise they would not belong to our association.

The suggestion, therefore, that members of the bar in deciding whether they will join a bar association consider rather the obligation which they owe to the profession and the assistance which they might render instead of trying to compute the return in dollars which would come to them from their annual investment in the form of dues, is addressed to lawyers who are not now members of any bar association.

In other words the Massachusetts Bar Association is most desirous of having as a member every member of the bar. If there are about 8,000 lawyers in Massachusetts then we have only about 20% in our association. There is no reason why we should not have at least every active member of the bar on our rolls. But the ideal bar association membership would not be fulfilled by membership in the Massachusetts Bar Association alone, not even if that membership were active and zealous. It is my view that a member of the bar in Massachusetts cannot properly fulfill his obligations to his profession and the duty which he owes to himself, unless he is an active member of the local bar association within the district where he practices law, an active member of the Massachusetts Bar Association, and finally an active member of the American Bar Association. There are problems, for example, which may arise in Worcester County, cognizable only by Worcester County lawyers, peculiar to that district, and soluble preferably by the active cooperation of the Worcester County Bar Association. Some of those particular problems might not greatly interest, except in a comparative academic way, the lawyer practising in Boston. But the lawyer in Boston as well as the lawyer in Worcester is interested in all of the problems of the profession which have a state-wide aspect, and which can only properly be solved by the active cooperation of the Massachusetts Bar Association. And carrying the analogy a step farther it is apparent that while lawyers in each state have their own state problems in which those of other states are not interested, yet they all have equal interest in professional problems national in their scope, and in order to solve those problems properly the cooperation of the American Bar Association is necessary. Thus it is plain, I think, that in order to participate fully in the problems and burdens of his profession, as well as to get the full measure of its benefits, the lawyer should be a member of these three associations.

And thus I am brought to a subject which I wish to touch on briefly and which has been suggested in the notice of this meeting by our indefatigable secretary, namely,

The Integration of the Bar.

This is a matter that has been agitated for some years. It seems unnecessary to multiply arguments to prove that the best results from bar association membership can only be obtained by coordinating and combining the strength of all of the separate bar associations so that they can move forward as one whole body instead of revolving each upon its own center and while apparently moving with some rapidity, are nevertheless remaining practically in the same place and are not making any very general advance.

To overcome this defect in the strength of our bar association system, if I may call it so where no system seems to exist, I endeavored, when you did me the honor to elect me to the presidency of this association three years ago, to bring about the coordination of the bar by means of some plan of uniting all of the various local bar associations so that they would automatically be a part of the Massachusetts Bar Association. The subject was discussed informally with some of our officers and members, and the first active step toward coordination was taken late last year when I called a meeting of representatives of many county and city bar associations to discuss the matter informally and to make suggestions as to the best way in which proper coordination with

your association could be obtained. The meeting was very encouraging. Some twenty-five or more representatives of various associations attended that meeting although they did not represent as many different associations, there being in some cases two or three present from some of the associations. The plan was briefly outlined, the history of the movement stated and remarks called for. There was not a dissenting voice. Apparently all of the persons present approved the idea but of course comprehensive plans were lacking. It might even be said that many of those at that meeting were enthusiastic. The result was that a committee was appointed to report on the matter, the committee being given a free hand to perform its delegated duty in its own way.

The chairman of that committee, Mr. Edward M. Dangel, who is also president of the Law Society, in the last number of the *Law Society Journal*, has a special article on this subject and presently will make a report upon it and undoubtedly will join in the discussion. He has been active in the discharge of his duties as chairman of that committee, has personally visited and addressed meetings of many of the local bar associations and undoubtedly has a first-hand knowledge of the problems that have arisen during his investigation of the subject which exceeds any information which I possess. I have approached the matter generally with a conviction that proper coordination ought to be effected. He has concrete and specific ideas gained from personal contact with the associations which he will explain to you. Since that was written, ladies and gentlemen, I have learned that Mr. Dangel will not be here today, as he was taken ill yesterday and will not be able to come this morning, but Mr. MacMaster is here and will take part in the discussion in his stead later.

One thing only I do wish to refer to and after such reference I will have a recommendation to make in regard to it. That subject is the suggested plans as set forth in the August number of the MASSACHUSETTS LAW QUARTERLY. Of course you have all read and considered those plans as therein submitted. The object in thus presenting the matter was to bring before the members for discussion today, and ultimate action, a workable, tangible plan whereby coordination may be effected.

Suggested Plan No. 1 provides for radically changing the structure of our association. If that plan or one similar to it should be adopted it would mean that we would cease to be an association where every member is a delegate to the annual meeting with a right to vote as in the old fashioned town meeting. Instead we would become a delegate body and the annual meetings would be composed of delegates from various local bar associations.

In my experience I have never yet seen an annual meeting of the bar association which was so large in numbers as to be unable, or too cumbersome, properly to function. As far as attendance goes we have never yet been able to say that we have grown so large and the annual meeting so crowded that the time had come when it seemed necessary to change from a town meeting form of government where everyone has a say to a municipal form where there is one chief executive with representatives similar to those in a city council. My personal view is against such a change and I think the usefulness of the Massachusetts Bar Association would largely be destroyed if such a plan were adopted, and that our association would become merely a delegate body representing various local associations without the broad comprehensive viewpoint of a state-wide association.

The other plan suggested in the QUARTERLY would preserve our association as it is now but would also allow for representations therein through federated members of all local bar associations in the state. My personal view is in favor of that plan although it is plain that if adopted a more detailed structure would have to be worked out so that the plan could become operative.

The recommendation, therefore, that I wish to make is that a plan embodying the features of Plan No. 2 and not that of Plan No. 1 should be adopted.

I have said more than I intended to say about this subject. There are many other interesting and important matters which I should like to suggest such as the new rules adopted by the Superior Court, legal education, the unlawful practice of the law, encroachment upon the legal field by corporations, and the like. But this paper has already become too long so that I shall confine myself to referring to one other matter which has attracted much public notice recently. It is perhaps the most important subject that can be discussed among lawyers, and that is—

ILLEGAL PRACTICES OF LAWYERS WITH REFERENCE TO TORT ACTIONS.

As will be pointed out in the next number of the QUARTERLY the present investigation which has been ordered by the Supreme Judicial Court was not at the request of the Massachusetts Bar Association. That investigation was the result of a meeting of men representing various organizations in Boston last July. There were present representatives of almost all of the liability insurance companies doing business in Massachusetts, some seventy-four or more in number, a representative of the Governor's Safety Committee, the Registrar of Motor Vehicles, the State Insurance Department, the State Board of Registration and Medicine, Massachusetts Medical Society, Boston Chamber of Commerce, and the Boston Automobile Club as a unit of the American Automobile Association. A permanent committee was organized of which the president of the Massachusetts Bar Association was made chairman and Mr. Edgar P. Dougherty, 3rd Deputy Insurance Commissioner was made secretary. That committee drafted and filed with the Supreme Judicial Court the petition which has been published in the newspapers and will be printed in the next QUARTERLY upon which petition the court issued the order which will also appear in the QUARTERLY. William Harold Hitchcock, Esquire, who has just been appointed by the Supreme Judicial Court as the Chairman of the Board of Bar Examiners, was named as the Special Commissioner to hear the evidence that may be presented to him by this committee and then to report findings and recommendations to the court. The hearings are to be private unless any lawyer whose activities are under investigation desires a public hearing. It is probable that these hearings will begin shortly after January 1st but no exact date has yet been fixed. Of course I am not expected to state any of the information which has come to the committee but I can without impropriety repeat what I said in my public statement at the time the petition and order of the court became public, and that is, that the committee has information which, if it proves to be reliable, indicates many fraudulent practices among attorneys, the nature of which is more particularly set out in the petition referred to. And I wish also to repeat what I then said, that the percentage of lawyers who appear to have indulged in reprehensible practices is comparatively small, being in fact less than 1%, and of course it is probable that the numbers actually found to be guilty will be less than that. Our investigation if successful ought to result in honorable members of the bar getting a larger share of tort practice than has fallen to their lot of late years and especially since the Compulsory Insurance Law was adopted.

The fact that lawyers have been abused and criticized from time immemorial is well known. Whether that conclusion is justified is another question.

I was interested in reading last week an article in the *New York Sun* relative to the little Republic of Andorra, an almost unfindable spot on the border line between France and Spain. That country, it appears,

has no written laws whatever and its Parliament meets rather infrequently. Parliament met there recently and that meeting was the first for 900 years. The mule breeder in Andorra stands the highest in the social scale and persons engaged in any of the professions stand lowest and the lowest of these which in fact is prohibited altogether, is the profession of law. Nothing can be more demoralizing to Andorrans than to be a lawyer. Hence there are no lawyers in the country and no man would dare lose cast entirely by becoming a judge. Still judges were necessary occasionally and the Andorrans, back in the days of Charlemagne, hit upon the plan of hiring judges from Spain or France whenever they were necessary. Last summer it appeared that some 200 or 300 Spaniards imported into Andorra for road construction, started a revolutionary riot. The militia was ordered mobilized when it was discovered that it was a militia in name only and all of the members were officers since it is beneath the dignity of anyone in Andorra to serve as a private. The militia refused to mobilize whereupon the Captain General called in the judges and the mutineers were hailed before these foreign judges brought in to consider their cases. Small fines ranging from the equivalent of $2.00 to $40.00 were imposed. But some of the defendants were sentenced to stand under arrest in the public square from 2 to 8 days. This caused so much indignation that there was a plan for mobilizing in earnest and taking vengeance upon the judges who thereupon got out of the country. And now it appears that in this anomalous situation the Parliament of mountain peasants made and passed a law which like all of its predecessors is unwritten and which will be unchanged until the next Parliament meets, to the effect that judges in Andorra hereafter, in the interest of their personal safety, will be given 8 days to get out of the country after they have heard all cases before them and then from those places of foreign security they will be permitted to distribute such fines and sentences as they deem suitable, their absence from the country making it, apparently, entirely safe for them to do so.

What it was that caused the profession of the law to fall into such disrepute in Andorra does not appear but certainly nothing could cause it to fall more rapidly in repute than such evil practices as those enumerated in the petition filed by this committee. Our information shows to us that these practices, if they exist at all, are confined to a very small proportion of our profession. If our investigation is successful and the ends sought are accomplished, much of the public clamor and criticism against the legal profession and against lawyers will be silenced and the lawyer in Massachusetts will be considered at least as high as a mule breeder.

And now two things remain for me to say. First, that I am very keenly sensible of the high honor accorded to me by my brethren in making me their president and keeping me there for three years. The three-year term, however, became possible merely because the by-laws were changed and I happened to be the recipient of the benefit of that change. I do not imagine for a moment that any particular ability of mine was recognized in the three-year term. I may repeat what I have often said that my election to the presidency of the Massachusetts Bar Association was quite the very finest thing that ever happened to me.

And the next and last thing that I wish to do is to pay a well deserved tribute to the man whom I have elsewhere referred to as indefatigable, our worthy secretary Frank W. Grinnell. He does not know that I am going to say this. His knowledge on legal matters seems to be universal and how he finds time to do all of the important things that he does so well is an unfathomable mystery. He is the most used and most useful, the most valued and most valuable member of the Massachusetts Bar.

REPORT OF THE EXECUTIVE COMMITTEE.

BY THE SECRETARY.

As explained in the account to be printed in the QUARTERLY, it has been frequently reported in certain newspapers that the current investigation of unprofessional conduct in accident cases which has been directed by the Supreme Judicial Court was being conducted by this association. As explained in the President's address, this is not so. The matter was considered by the officers of the association and the Executive Committee in 1929, and it was decided that the association was not sufficiently equipped with funds to conduct such an investigation. After the inquiry was directed by the Supreme Judicial Court by the order (to be printed in the QUARTERLY with the petition and memorandum of law filed in court by the Citizens Committee in charge of the investigation) the Executive Committee at its meeting on December 19, 1931, voted to appropriate $100. from the funds of the association as a contribution toward the expense of the investigation, which, under the order of the court, can not be paid from public funds.

The Massachusetts annotations of the restatements of the law of contracts and of the conflict of laws of the American Institute are still in course of preparation. The final draft of these two subjects is expected to be submitted and approved by the Law Institute at its next annual meeting in May, 1932, and to be ready for distribution in the fall of 1932. The annotations are being prepared, in accordance with the previous action of the Executive Committee, at the joint expense of the Massachusetts Bar Association and the Bar Association of the City of Boston, each of which has agreed to contribute $1,000 for this work. The cost of printing the state annotations with the restatements will be assumed by the American Law Institute and the restatements when published will be obtainable from the institute at a small price.

Upon the recommendation of the national conference of bar association delegates and of the American Bar Association, as explained in the report of the committee of that conference reprinted in the MASSACHUSETTS LAW QUARTERLY for August, 1931, pages 00-00, Chief Justice Hughes and the national conference of federal Circuit Judges have approved the plan for federal district committees of the bar to cooperate with the federal judges in the different circuits and with the National Judicial Conference.

The membership in the association is still about 1,000 active paying members. There have been twelve deaths of members reported to the secretary during the past year, as follows:

Charles F. D. Belden, Boston
Roland W. Boyden, Boston
Walter Coulson, Lawrence
Franklin G. Fessenden, Greenfield
William Caleb Loring, Boston
Harry Mason, Lawrence
Oliver Mitchell, Boston
Thomas W. Proctor, Boston
Josiah H. Quincy, Boston
J. Frank Scannell, Boston
William B. Sullivan, Boston
Bertram G. Waters, Boston

The Committee on Membership has reported thirty-six members admitted as follows:

C. Harold Baldwin, 18 Tremont Street, Boston
James H. Baldwin, 18 Tremont Street, Boston
Raymond P. Baldwin, 1 Federal Street, Boston
H. Ware Barnum, Park Square Building, Boston
Max E. Bernkopf, 73 Tremont Street, Boston
George K. Black, 35 Congress Street, Boston
Carl M. Blair, 314 Main Street, Worcester
Philip H. Breen, 332 Main Street, Worcester
Lincoln Bryant, 53 State Street, Boston
David Burstein, 60 State Street, Boston

Edward A. Cheney, 85 Devonshire Street, Boston
Declan W. Corcoran, 18 Tremont Street, Boston
Joseph G. Crane, 75 Federal Street, Boston
Francis J. V. Dakin, 53 State Street, Boston
Gay Gleason, 33 Broad Street, Boston
John J. Heffernan, 33 Broad Street, Boston
Nickels B. Huston, 255 North Street, Pittsfield
Edward Hutchins, Boston
John C. Jones, 53 State Street, Boston
Lawrence F. Lyons, 100 North Street, Pittsfield
Thomas H. Mahoney, 40 Court Street, Boston
Walter Malcolm, 1 Federal Street, Boston
John F. Malley, 15 State Street, Boston
Vernon Mason, 914 Tremont Building, Boston
John W. Newman, 18 Tremont Street, Boston
Wilfred J. Paquet, 40 Broad Street, Boston
J. Belden Sly, 53 State Street, Boston
Wilfred H. Smart, 44 School Street, Boston
Cecil Smith, 50 Federal Street, Boston
Samuel Stern, 18 Tremont Street, Boston
Michael H. Sullivan, 24 School Street, Boston
Mary L. Tebeau, Franklin Street, Hopkinton
Edmund L. Twomey, 735 Exchange Building, Boston
George H. Yagjian, 332 Main Street, Worcester

Report accepted.

REPORT OF THE TREASURER.

THE SECRETARY.—Judge Mason can not be here but he has sent me his report. The receipts from dues amounted to almost $5,000 and all but $185.92 was spent. The main items of expense amounting to about $2,857.69 were for various numbers of the MASSACHUSETTS LAW QUARTERLY including a special number in September, 1930, in connection with the visit of the foreign lawyers and including also the reprint of the report of the Superior Court Committee on Rules with the annotations, which appeared in the February number and attracted the special interest of members. The other main items were for clerical assistance to the Secretary-Editor and to Mr. Park Carpenter, the Secretary of the Grievance Committee. I will read the details of the report if any one wishes to hear them.

The reserve fund in the Worcester Mechanics Savings Bank has not been touched at all. We can not yet say whether it will be necessary to use some of it to meet the share of the expense which has been assumed by the association (with the Boston Bar Association) of preparing the Massachusetts annotations for the restatements of the law of contracts and conflict of laws of the American Law Institute, the publication of which is expected next fall.

This is the end of Judge Mason's service of five or six years, as Treasurer, for which he certainly deserves the thanks of the association.

JOHN W. MASON, *Treasurer.*

In account with Massachusetts Bar Association.

Dr.

Balance from prior accounts:	
Worcester Mechanics Savings Bank	$3,173.32
Hampshire County Trust Co.	120.19
Northampton National Bank & Trust Co.	19.81
Dues	4,980.00
Dividend Worcester Mechanics Savings Bank	79.33
Interest Northampton National Bank & Trust Co.	13.05
	$8,385.70

Cr.

1931.			
Jan.	7.	F. M. Crittenden—Notices of dues	$7.00
"	7.	Sun Printing Corporation—Statistics of District Cts.	8.88
"	7.	Rockwell & Churchill Press—QUARTERLY and envelopes	201.50
"	7.	Jordan & More Press—Judicial Council Report (for QUARTERLY)	112.00
"	9.	Raynor M. Gardiner—Stationery and postage	7.82
"	10.	Samuel Marcus Press—Printing (for QUARTERLY)	30.00
"	10.	John W. Mason—Postage, envelopes and printing.	46.16
"	14.	Elliott Addressing Machine Co.—Supplies	.65
"	14.	Rockwell & Churchill Press—Notices, mailing & QUARTERLY	151.50
"	17.	The American Institute of Criminal Law and Criminology—Dues	5.50
"	20.	American Bar Association Journal—Binder	1.50
"	20.	Frank H. & Philip H. Burt—Report of Annual Meeting	81.30
"	24.	H. C. Adair Printing Co.—Reprints (for QUARTERLY)	35.00
Feb.	2.	Lawrence Press, Inc.—Letterheads and envelopes	18.40
"	2.	United States Daily Publishing Co.—Wickersham Commission Report, reprints	60.00
"	2.	Martindale Hubbell Law Directory, Inc.—Directory	25.60
"	2.	Rockwell & Churchill Press—Letterheads	13.25
"	5.	Wm. M. Cochran Co.—Surety on Treasurer's bond	10.00
"	19.	Frank W. Grinnell—Stenographer	462.00
Mar.	5.	Griffith-Stillings—Superior Court Rules	546.75
"	6.	Frank W. Grinnell—Postage on QUARTERLY	35.00
Apr.	3.	Dunbar F. Carpenter—Stenographer	2.50
"	4.	Park Carpenter—Clerical Assistance and Telephone	101.30
May	13.	Park Carpenter—Expenses Grievance Committee	123.90
"	13.	Rockwell & Churchill Press—Printing and mailing	942.75
"	23.	Elliott Addressing Machine Co.	1.05
June	15.	Dunbar F. Carpenter—Stenographer	3.00
"	25.	Park Carpenter—Grievance Committee expenses	108.40
"	29.	George K. Gardner—Account annotation on Contracts	75.00
July	7.	Park Carpenter—Grievance Committee expenses	83.10
"	10.	Gardner W. Russell—Services and expenses for Grievance Committee	300.48
Aug.	21.	Rockwell & Churchill Press—QUARTERLY and envelopes	541.00
Sept.	24.	Park Carpenter—Grievance Committee expenses	158.83
Oct.	3.	Stoughton Bell—Grievance Committee expenses	1.95
"	10.	Elliott Addressing Machine Co.	1.91
Nov.	4.	Park Carpenter—Grievance Committee expenses	82.00
"	4.	West Publishing Co.—3 copies 162 N. E. 487	.75
"	5.	Park Carpenter—Grievance Committee expenses	100.60
"	27.	Rockwell & Churchill Press—QUARTERLY and envelopes	343.00
Dec.	4.	Park Carpenter—Grievance Committee expenses	82.50
"	4.	Rockwell & Churchill Press—Reprints from August QUARTERLY	10.75
"	14.	John W. Mason—Postage	3.50
"	15.	Sun Printing Corporation—Reprint of statistics	8.15
"	15.	Filing Equipment Bureau—Cards	10.90
		Balances:	
		Worcester Mechanics Savings Bank	3,252.65
		Northampton National Bank & Trust Co.	185.92
			$8,385.70

Respectfully submitted,

JOHN W. MASON, *Treasurer.*

The report was accepted, with a unanimous vote of thanks to Judge Mason for his services.

REPORT OF GRIEVANCE COMMITTEE.

The Committee on Grievances of the Massachusetts Bar Association begs leave to report that as set forth in the tabulated summary of complaints, 18 were pending at the beginning of the year and 50 have been received since the last annual meeting, a total of 68. Of these 36 have been disposed of by the secretary; 6 have been disposed of by the committee and 26 are now pending. Of the 26 now pending 2 are under investigation by the secretary; 2 have been referred to the proper district attorney for investigation, and 2 are awaiting further information from the complainant. Of the 6 disposed of by the committee 2 have been referred on a divided vote to the executive committee with the recommendation that the association file an information in court. These two cases will be disposed of by the executive committee. In 4 cases the committee has censured the member of the bar for his action.

Nearly 20% of the cases coming before the committee have been complaints against attorneys for failure to remit collections, refusal to account, embezzlement of trust funds, and like offenses. This is a distressing situation and one which appears to be growing, in fact there appears to be among certain members of the bar a lack of realization of the fact that funds belonging to the client should not be mingled with the personal funds of attorneys, but should be kept in a separate fund and handled by them as, it is in fact, a fund intrusted to their care.

Another matter which is not receiving the proper attention from members of the bar is the number of complaints that are received concerning the use by lawyers of affiliated collection agencies as runners. The fact that under General Laws, Chapter 93, Section 24, a collection agency is permitted to solicit the right to collect or receive payment for another of "an account, bill or other indebtedness" does not create in an attorney the right to incorporate and then cause the representative of the collection agency to solicit business for him personally and does not make such solicitation any the less reprehensible than would be the direct employment of individual runners by members of the bar. The statutes governing the practice of the law, Chapter 221 of the General Laws, Section 47 contemplates the employment by the collection agency of an attorney, "to give legal advice concerning or to prosecute actions in court relating to the adjustment or collection of debts and accounts only." Obviously this does not give the attorney the right to employ a collection agency to solicit business for him. In some, if not in many cases contractual relations have been entered into between individual members of the bar and a collection agency whereby the member of the bar permits his name to be used as counsel for the agency in return for business which is turned over to him.

We have had two complaints which have disclosed written contract between counsel and client by which counsel agreed not only that there should be no charge if the action were unsuccessful but that counsel would bear all expenses of suit and would indemnify the client against any liability which he might incur by bringing suit. It would be well if the impropriety of this practice could be generally brought to the attention of the members of the bar for in some of the cases that have come to the attention of the committee in the past there has apparently been a lack of appreciation of the wrongdoing.

I cannot close this report without expressing the appreciation of the committee to our secretary, Mr. Park Carpenter, who has conducted the work of the committee in a vigorous and highly intelligent manner.

Respectfully submitted,

December 19, 1931. STOUGHTON BELL, *Chairman.*

SUMMARY OF COMPLAINTS BEFORE COMMITTEE ON GRIEVANCES OF THE MASSACHUSETTS BAR ASSOCIATION.

Complaints Pending December 27, 1930		18	
Complaints Received from December 28, 1930, to December 17, 1931		50	
			68

DISPOSITIONS

Disposed of by Secretary			
No basis for action by Committee	4		
Complaint withdrawn	3		
Failure to furnish information required	9		
Investigated and dismissed as without merit	11		
Pending civil action, appropriate remedy	1		
Adjusted to satisfaction of complainant	8		
		36	
Disposed of by Committee			
By censure	2		
By censure after adjustment	2		
Referred to Executive Committee, recommending filing in Court of information	2		
		6	
			42
Pending			
Further information from complainant	2		
Under investigation by District Attorney	2		
Under investigation by Secretary	22		
		26	
			68

CLASSIFICATION OF COMPLAINTS

	Total	Disposed of by Secretary: Dismissed Without Action	Disposed of by Secretary: Adjusted by Secretary	Disposed of by Committee: Censure	Disposed of by Committee: Censure and Adjustment	Disposed of by Committee: Reference to Exec. Com.	Pending: Pending
Negligence	7	5					2
Misinforming client	2			1			1
Failure to proceed after accepting retainer	4	2					2
Failure to return papers	4	1	2				1
Failure to account	8		4				4
Failure to remit	10		6		2		2
Misapplication of funds or property	7	2					5
Forgery	2	2					
Embezzlement	2						2
Overcharging	4	1	1				2
Corrupt practice	2	2					
Solicitation	3	1				2	
Champerty	1			1			
Representing conflicting interests	3	3					
Miscellaneous	9	4					5
	68	23	13	2	2	2	26

The report was accepted.

REPORT OF COMMITTEE ON JUDICIAL APPOINTMENTS.

The Committee has tendered its services to His Excellency Governor Ely. It has been called upon to take action but once during the past year, and that was on the occasion of the appointment of a Judge for the Municipal Court, Dorchester District. The Committee submitted three names to the Governor and Judge Walsh, one of the three, was appointed. The Governor expressed his appreciation of the willingness of the association to assist him in the difficult task of selecting suitable

men to fill vacancies on the bench as they occur, and will undoubtedly give great weight to any recommendations which may be made in the future.

Respectfully submitted,

December 17, 1931. JAMES D. COLT, *Chairman.*

The report was accepted.

REPORT OF COMMITTEE ON LEGISLATION.

To the Members of the Massachusetts Bar Association:

The 1931 Committee on Legislation met at the rooms of the Boston Bar Association, Parker House, Boston, Mass., on December 19, 1931, at 10 a. m. At this meeting all of the recommendations contained in the seventh report of the Judicial Council were considered.

With respect to these recommendations, the following action was taken:

1. Compensation and expenses of Board of Bar Examiners. Page 9. Approved.
2. Entry fee in Superior Court. Pages 13 and 14. Voted to recommend an entry fee of $10.

3a. Extension of St. 1923, c. 469, relative to assignment of District Court judges to sit in Superior Court for trial of misdemeanor cases. Page 16. Approved.

3b. Creation of judicial body for reviewing sentences and to avoid double trials on facts in misdemeanor cases in Municipal Court of the City of Boston. Pages 17–19 and 67. Approved.

4. Payment of wages due deceased employees. Page 24. Approved.
5. Private conversations between husband and wife in domestic relations cases. Page 25. Approved.
6. Draft act concerning inquests. Page 26. Approved.
7. Venue in transitory actions in District Courts. Pages 26 and 27. Approved.
8. Procedure in illegitimate children's cases. Pages 28 to 31 inclusive. Voted to disapprove Senate bill No. 461.
9. Report of evidence to Supreme Judicial Court on appeal in equity cases. Pages 31 and 32. Voted to disapprove House bill No. 858.
10. Effect of judgment by agreement of parties to an action on later suit by defendant in said action. Pages 32 and 33. Voted to approve draft act to accomplish purpose contemplated in Senate bill No. 203 and House bills Nos. 380 and 973.
11. Pleadings as evidence. Page 33. Voted to disapprove House bill No. 571.
12. Facilitating recovery of damages on motor vehicle cases. Page 33. Voted to disapprove Senate bill No. 251.
13. Rule that registration of automobile in defendant's name is prima facie evidence of its operation by a person for whose conduct defendant is legally responsible, extended to equitable proceedings to collect unpaid judgment from a liability insurance company. Pages 34 and 35. Voted to approve draft act to accomplish purpose contemplated by House bill No. 381.
14. Hospital liens. Pages 36 and 37. Voted to disapprove House bill No. 494.
15. Uniform Conditional Sales Act. Pages 37 and 38. Voted: "No action necessary."

Respectfully submitted,

JOHN G. BRACKETT, *Chairman.*

THE PRESIDENT.—If there is no objection the report will be accepted and placed on file. Hearing no objection, that will be done.

ELECTION OF OFFICERS.

The report of the Committee on Nominations as printed on the back of the call for the meeting (see page 4), was then read and the Secretary stated that he received no other nominations under the by-laws.

A ballot being taken, the persons thus nominated, as printed on the first page of this pamphlet, were declared elected.

DISCUSSION OF PROPOSED FEDERATION OR AFFILIATION OF BAR ASSOCIATIONS.

THE PRESIDENT.—We can throw open for discussion now these subjects that have been circulated in the notice of the meeting. The first was the question of closer federation or affiliation, the subject that I referred to and that we call the integration of the bar. Possibly Mr. MacMaster would like to speak about that in place of Mr. Dangel.

MR. E. A. MACMASTER (Bridgewater).—Mr. President, last evening I was informed that Mr. Dangel was ill and would be unable to be here and his office requested me to so report that fact to the meeting. There has been some work done along these lines, but personally I feel it would be highly disadvantageous to go into it in detail at this time in the absense of Mr. Dangel.* That is my personal feeling as a member of the

* The following discussion by Mr. Dangel appears in *The Law Society Journal* for May, August and November, 1931.

ORGANIZING THE BAR OF THIS COMMONWEALTH

BY EDWARD M. DANGEL

The bar of this Commonwealth, as in other States, is undergoing a transformation and is virtually losing its existence.

This condition may be attributed to five causes.

(1) THE LOW STANDARDS OF ADMISSION.

(2) THE OVERCROWDED FIELD OF THE LAW.

There are 8,000 lawyers in this Commonwealth of which 4,000 are in Greater Boston.

Competition may be the life of business but it certainly is the death of ethics in a profession like ours.

(3) FAILURE OF THE BAR TO MAINTAIN THE HIGH ESTEEM WHICH IT FORMERLY HELD.

What has happened to the legal profession in the last twenty years?

In the old days the lawyer was the Squire, the leader of the community. He was the sage, the wise man of the town whose opinion was sought on all public and private matters. Today the bar is in disrepute. What is being done about it?

(4) AGENCIES ARE USURPING THE FUNCTIONS OF THE BAR.

a. Banks and Trust Companies.
b. Collection agencies.
c. Arbitration committees.
d. Chambers of Commerce.
e. Trade organizations.
f. Insurance companies and doctors.
g. Conveyancing companies.
h. Corporation organizing companies and accountants.

Because of the activities of these agencies who are usurping our functions and who capitalize and create in the lay mind the low plane upon which our profession is put, the field in which a lawyer can exercise his professional talent is now very much restricted.

(5) THE INACTIVITY OF THE BAR TO PRESERVE ITS LIFE THROUGH ACTIVE, EFFICIENT AND INTENSIVE BAR ORGANIZATIONS.

The lawyers of this Commonwealth must become conscious that there is real necessity for active State Organization.

We have very successfully organized everything except ourselves. This is a day of government by organized minorities and unless the bar is prepared to take its place as an organized minority it will lose its influence in the shaping of public policy in this Commonwealth.

The day when a good idea was sufficient to insure some kind of effective governmental action is completely passed.

The local bar associations are very helpless alone. Of course, they comprise the greatest number of members, but what can they do with local problems? What can they do against the local trust company, or the man who lives close by and whose family knows your family? Yet, the local bar associations cannot be dispensed with any more than a church could function without a local parish.

We need a type of organization which will bring all of these forces together and bring to us the experience which men are having all over the state. It seems to me that we are in a situation where we have plenty of influence and plenty of standing at the

committee. I think Mr. Wiggin was associated on that committee and I fancy he has the same feeling. May I ask Mr. Wiggin to corroborate that statement?

MR. JOSEPH WIGGIN (Boston).—Correct.

MR. MACMASTER.—I would therefore request in behalf of the committee, in the absence of Mr. Dangel, that further time be given and a report in detail be made at some later time.

THE PRESIDENT.—Do you mean, Mr. MacMaster, that you think the whole matter ought to go over and not be discussed today?

MR. MACMASTER.—That is my personal feeling, yes, Mr. President.

THE PRESIDENT.—It may be that some of the members have come here just for the purpose of talking about it.

MR. MACMASTER.—There is no objection to discussion, but so far as the committee's definite report is concerned, I think that ought to go over.

SECRETARY GRINNELL.—Mr. Chairman, perhaps I might say a word that would clear the air. This matter was put in the notice of the annual meeting without the slightest intention or idea of any definite action in the way of adopting any plan. The reason for putting it in was to focus attention on the problem and to see if the members of the association who came to the meeting had any suggestions or views about the subject which could be considered by the executive committee and by the informal committee of representatives or members of other associations.

There has been this informal discussion of representatives of various local organizations, to which the President has referred, comprising twenty-five or thirty men; there was a great deal of interest in it and there seems to be a considerable sentiment in favor of some form of association. When it comes to the problem of sitting down to draw the details and outline such a plan, it is a more difficult problem to settle.

It seemed to me that since this association was the principal body involved in any such plan and that the plan involved to some extent a reorganization, or change in the by-laws, whatever plan was adopted, it was desirable that members of the association should have it called emphatically to their attention, and the facts and the problems and the work of the association explained to them, so that they could make suggestions as to what was desirable and feasible and worth considering. Accordingly, I hope that anyone having any ideas for or against, either a

---

bar, so that if we can make it effective through a proper organization the bar can regain and maintain its leadership.

Compare the organizations which we have with the organization which you will find functioning in our state capitol on behalf of bankers. Suppose a bill is introduced which affects vitally the lawyers, what happens? Generally, after it has passed, the bar discusses it. But suppose it affects the bankers. Every banker in every remote hamlet receives a notice to do something at once with his representative about it; and he does it. That is where he differs from the local lawyer. We have practically no effective representation in matters which concern ourselves. Our efforts even within our own bar associations are to do something which is of more benefit to clients than ourselves. Now, certainly, we need some type of organization which will concentrate its efforts on subjects which from time to time are of importance to us.

The primary thing that is needed at this time is the stimulation of thought, activity and discussion on this subject. The first act is to arouse in the average lawyer the consciousness that he has a problem. The lawyer is an individualist. He has less inclination for an organization to protect himself than the man of any other profession.

No profession has had as much class conscience as the bar. Let us now develop some class consciousness. Let us not get away from the fact that we have certain rights, remembering always that the monopoly which we enjoy is protected and is given us in order that we may serve the public; let us, through organization develop a form of service that will put our profession upon a plane so high that no other agencies can equal it.

If the lawyers are to exert a large influence they must exert it on behalf of the people of this Commonwealth and not on behalf of themselves. The people must become impressed with the fact that the lawyers of this Commonwealth are working, not alone for their own interests, but for the interests of the public at large.

We can accomplish this only by intensive, efficient and active State Bar Organization; by close relationship between the several bar associations of this Commonwealth.

We should join on a common meeting ground and discuss and take action upon the matters which are vital to our profession; that common meeting ground is The Law Society of Massachusetts.

general idea or a specific idea (because sooner or later the thing has got to be specific if it comes about at all), will express them here for the assistance of both the executive committee and the representatives of other associations who are interested in the subject. I stated the situation quite fully in the QUARTERLY (for August, 1931, pp. 31–36), with a view to bringing out suggestions, and stated fully the two concrete plans which had been suggested thus far. I also stated that I did not visualize the effective operation of the plan No. 1, which would change this association into a federated body like that of the federation of the bar associations of Western New York. It seemed to me, and still seems to me, as a practical matter from my experience with bar association problems, that it would disintegrate the Massachusetts Bar Association.

On the other hand, the plan No. 2, which I drafted as a suggestion of a step in the direction of closer relations, would do away with the necessity of election by the membership committee for members of local associations, and those members could become members of this association upon a letter from the secretary of the local association that they were members in good standing of that association and the payment of their dues to this association of five dollars a year, and that the local association itself could become a federated or affiliated member of the state association (with a right to send a delegate or two, whichever number might be determined upon), upon the payment of five dollars. In that way the local association representative and any members of it who should see fit to become members of the state association on payment of the five dollars would automatically be brought into the state association, would receive the literature and take part in the proceedings. In other words it would be a step in the direction of bringing the bar closer together. It would not involve any reorganization of the state association, any upsetting of the financial arrangements or anything of the kind. What the result of it would be I do not know. But it would be an experiment in that direction.

Those are the two plans thus far suggested. There may be other and better plans. But it is a very practical proposition. If you are going to have the activities of the state bar association carried on, even as they now are, I think you have got to continue your individual membership, both for the purpose of retaining the interest in that association and for the purpose of securing a continuity of income, without which you cannot carry on the work even as it is now done.

If you can get a larger income from a larger membership, you can keep in touch with more members of the bar and bring about perhaps a more general or unified interest in the problems before the profession, and it may stimulate interest among some of the local associations.

The whole problem of the relation of the grievance committees of the state and local associations is involved in this discussion to some extent. Mr. Bailey has pointed out that one of the reasons for the creation of the state association was the fact that men like the late John C. Hammond* of Northampton and others believed that more im-

*At the annual meeting of the association in December, 1912, there was an extended discussion of the whole subject of the Grievance Committee work of the association. The late John C. Hammond, of Northampton, one of the organizers of the association and elected president at that meeting, spoke in the course of the discussion as follows (Massachusetts Bar Association Reports, Vol. III, page 117):

> "The local associations may cooperate, and undoubtedly in the larger counties the difficulty is not so great as the difficulty observed in the smaller counties. I have in mind an instance where the local bar felt sure that action ought to be brought, but they were equally sure that the motives would be impugned because of personal relations with the man being inquired of, and the matter drifted along and came to nothing. I hope that the state bar association will continue to magnify this part of its office and I feel sure that they will cooperate with local bar associations where they are large enough and well enough organized so that these difficulties which I have in mind will not embarrass them. I think that in probably the majority of cases the matter can be handled better by the state bar association and made more emphatic to the Court than it would if it comes from a local association."

personal committees than were obtainable in some of the counties of the Commonwealth were needed in order to function at all.

Our committee has always, I think, had to function in regard to Essex County grievances. That is true in other counties to some extent. Grievance work is unpleasant but someone must do it if the bar is to retain public confidence.

In Boston, the Boston Bar Association pays four or five thousand dollars a year — I have forgotten the exact amount — for a permanent paid secretary, and of course the members live right here and they can meet regularly. I think they meet about once a week, if I am not mistaken, and they handle from six to seven hundred cases a year.

The Middlesex Association has done a considerable amount of active work under the chairmanship of Mr. Pevey. It has been the practice of the grievance committee of the state association — Mr. Bell is here and he can correct me if I misstate anything — to refer all complaints of Boston lawyers and Middlesex lawyers to those various committees.

In regard to the complaints of other counties, the grievance committee, as has been stated in its reports in the past, has tried to cooperate and comply with the wishes of the local committees when they knew what they were and, on the other hand, they have not declined to consider cases which have been brought directly to them. In view of the reasons for creating this association, as explained in the previous annual meetings by those who organized it and as already explained here today, it was considered proper that such work should be done. Sometimes, and quite often, I think, the state grievance committee is specifically requested by the local committee to take over the matter and consider it, and that has been done.*

The cooperative relations between the associations present a problem and the expense is a problem. As stated in the QUARTERLY, the expense connected with the growing grievance work of the committee of the state association is a considerable item and has resulted in some shifting of the allocation of the funds. That is a part of the problem before the state association — what plan can be adopted which will bring it in touch with members of the local associations and still continue to accomplish the work.

MR. GEORGE R. NUTTER.—I wish the Secretary would kindly outline those two plans which were mentioned, and also would state particularly how each of them would be financed; because, whether we like it or not, the financing of these plans is the most important part.

MR. BELL.—Mr. President, while the Secretary is looking them up, may I state one additional reason that has been presented to the Grievance Committee?

THE PRESIDENT.—Yes.

MR. BELL.—In some instances members of the bar who have been complained against prefer very much to have the matter handled by a committee of the Massachusetts Bar Association than to have it handled in their own community. They very much prefer to make their statement to the Massachusetts committee and, if possible, to straighten matters out without the local publicity which might come to them by going to their own local committee.

THE PRESIDENT.—If you wish, we will add that to the report.

MR. BELL.—I simply wanted to add that to enlarge upon Mr. Grinnell's statement in regard to it.

---

* Since this discussion the Secretary has received a request from the New Bedford Bar Association that the state association act on a New Bedford complaint. There is no Bristol County Bar Association but New Bedford, Fall River and Taunton each have local associations.

THE PRESIDENT.—All right.

SECRETARY GRINNELL.—Plan No. 1, as stated in the QUARTERLY, was as follows:

(Reading Plan I, as printed in the QUARTERLY for August, 1931, pp. 32–33, as follows:)

1. The Massachusetts Bar Association be changed in structure so as to function as a main or central organization representing the bar of the entire Commonwealth, and coordinating the activities of county and local Bar Associations subordinate to or affiliated with it, and that each member of a local or affiliated bar association, by virtue of his membership therein, shall become automatically a member of the Massachusetts Bar Association.

2. The activities of the Massachusetts Bar Association shall be conducted, not by its members as such, but by delegates chosen by the local or affiliated bar associations. Each local or affiliated bar association shall select at least two delegates and two alternates for each one hundred of its members or fraction thereof.

3. Such delegates shall meet periodically to conduct the affairs of the Massachusetts Bar Association, elect its officers, and generally to manage its business. At such meetings, all members of the Massachusetts Bar Association may attend and take part in all discussions, although only delegates or their alternates shall be entitled to vote.

4. Members of the Massachusetts Bar Association, not connected or associated with any local or affiliated bar association, shall be designated "members at large" and be represented by two delegates and two alternates for each one hundred such "members at large" or fraction thereof.

5. The dues of the local or affiliated bar associations shall include the sum sufficient to pay per capita the dues of the Massachusetts Bar Association. (It is probable that $3.00 for each member would be sufficient for this purpose. This would mean, for example, that the dues of a local bar association now commonly set at $2.00 to $3.00 per year would be increased to $5.00 to $6.00 per year, of which $3.00 would be transmitted by the local bar association to the Massachusetts Bar Association. "Members at large" would pay $5.00 per year dues directly to the Massachusetts Bar Association.)

That is one of the suggestions that were made. The other plan suggested, and called "Plan II," is as follows:

Change the existing by-laws to provide that —

In addition to the regular membership above provided for, there shall be a federated membership in the association. Such federated members shall be of two classes: association members, which shall consist of any bar association in Massachusetts, and federated members, who are members of any member association.

Each member of a bar association of Massachusetts which has become an association member of the Massachusetts Bar Association shall, by virtue of his membership in the local or affiliated association, automatically become a federated member of the Massachusetts Bar Association upon the payment of the annual dues for such member. Such membership shall continue for the calendar year for which such dues are paid. The dues for an association member shall be the same as for an individual member.

That could be adopted without any radical change in the structure of the association and see what happened. There may be better plans. The first, Plan I, which was asked for and which I read, involves, of

course, a very radical change, an entire change in the structure of the association.

MR. NUTTER.—I am not authorized to speak for the Bar Association of the City of Boston and therefore what I have to say is purely my own opinion, but the situation before the bar associations of the Commonwealth is very similar to the situation that was before the chambers of commerce when I was president of the Boston Chamber of Commerce. There we had the peculiar situation that one chamber of commerce was larger than all the rest combined and had most of the available funds. When we come to look at the bar associations of the Commonwealth, I think you have to look at the fact that there are practicing in the City of Boston at least half the members of the bar and that the membership of the Bar Association of the City of Boston is now 1700, while there are only 1000 members in the Massachusetts Bar Association. Therefore you are going to come down on the question of money to these facts:—it costs the Bar Association of the City of Boston a maximum of $20 a year per member to maintain these rooms. I took a pretty careful estimate by postcard from all the members of the association before we finally came to the conclusion to have these rooms and determined that it was impossible for the Bar Association of the City of Boston to erect a building such as had floated in our minds for a generation, similar to the building in New York, and that the utmost the lawyers of this community would stand in the way of dues was a maximum of $20, while the younger men only pay half that, and I think men recently admitted pay only $2 for the first two or three years, just a nominal matter to get them in. In my judgment it would be impossible — I am speaking purely as an individual — to get the Bar Association of the City of Boston to come into any such plan as the first plan proposed, which is that they shall pay for it per capita and shall receive for it two delegates for each 100 members. A similar proposition was put up to the Boston Chamber of Commerce, which in plain English was that the Boston Chamber of Commerce should pay the bills and everybody else do the voting. You simply can't do it, in my judgment. So far as the money part is concerned, it is an interesting discussion, but it will lead to no practical results, because the 1700 members here are not going to pay $3 extra, or $5100. Half of them do not belong to the Massachusetts Bar Association, and you cannot put it on a per capita basis in any such way. Of course what we intend to have in this community — not in the lifetime of anybody present, but eventually — is a building. We have started a fund for the purpose which now amounts to $50,000. It will have to amount to at least half a million before we start and it will take, at least, half for a maintenance fund in order that the expense for the younger members of the bar may not be inordinate. In New York city the annual dues are $70, and even with that amount they have to pass the hat every once in a while. So there is no use, in my judgment as an individual, in discussing any such plan as Plan I, because Plan I as I see it contemplates that the Bar Association of the City of Boston even at $3 per capita shall pay over $5000, and that would be an impossibility. The association would not stand for it.

When you get to Plan II I think there is this possibility: I think it would be possible to work out some kind of a federated advisory council composed of representatives of all the associations and thereby, whatever their function might be, bring all the associations into closer contact. It would be, in my judgment, a good deal better to go slowly in that matter and see how it works out than it would be to adopt any very wide-flung plan which necessitated the payment of considerable money in the way of dues. Furthermore, I do not believe that on Plan I, apart from dues, we would have the same effective interest that you have now. In regard to the Massachusetts Bar Association, there is no question whatever in my mind that the great contribution it has made to the bar and the practice of the law and the judicial system in this Common-

wealth has consisted in its QUARTERLY. This QUARTERLY is recognized not only here but in England as one of the best edited legal periodicals emanating from a source like this that there is in the English language. That is not put in any too extravagant style. We want to maintain that. I think the publishing of that periodical is one of the best things that has ever happened to this bar. Now I do not believe that can be maintained by any federated idea, particularly if you are going to federate the bar associations on a per capita basis, and yet when it comes to voting have the representation on a bar association basis, which would mean that one association would pay most of the money and then only have a proportionate amount of votes. So that I believe you will have to keep on in this way unless you are going to destroy the efficacy of the present organization, and the interest which the members feel in it. The Massachusetts Bar Association suffers one disadvantage — not so great as exists in some other states, because the distances there are greater—but it is naturally very difficult to get a meeting of a committee. The members of the several committees come from all parts of the Commonwealth. We have to recognize that fact and look it in the face. It would be possible, in my judgment, to start in with some form of federated council which would have at least an advisory capacity at the beginning and see if you can develop anything. But that is really as far as I think the idea of federation can go. It is certainly as far as it can go, so far as money is concerned. You will excuse me for speaking first, but I find it impossible to be here this afternoon and I thought that while I could not speak authoritatively for the Bar Association of the City of Boston, I could, at least, say very frankly what I believe will be the feeling of that association when the question of money comes before it.

MR. EDWARD A. MACMASTER (of Bridgewater).—May I suggest at this moment that Mr. Thornburg of Waltham has requested me to call to the attention of the meeting a letter which he wrote to Mr. Dangel under date of December 17, and the material part of the letter so far as it pertains to the matter now under discussion is this:

> "I do not know as you are aware of the fact that at Lowell, on December 9, a federation of the bar associations of Middlesex County was formed and a constitution and by-laws were adopted. It is planned to have eventually all the bar associations of Massachusetts in the federation, which is to operate along the lines of the American Legion, so that I am happy to report that the baby is now creeping and in time I think will be able to walk. I might suggest that invitation be extended to Richard B. Walsh, Esq., of Lowell, as he has been elected the head of the Middlesex federation."

Speaking as an inconspicuous member of the committee which has this matter under consideration, I think I can safely say that it has been the desire of the committee at all times to preserve the Massachusetts Bar Association, and there is no suggestion in our minds, I think, but that whatever plan—whether it be Plan I or Plan II or some other that is yet to come into existence—whatever plan may be adopted should be adopted with the idea that it should benefit and strengthen the Massachusetts Bar Association rather than detract from its usefulness. Mr. Thornburg is here and perhaps he can elaborate a little more than I have done on the functions of this new federated association in Middlesex.

THE PRESIDENT.—We will be very glad to hear from Mr. Thornburg.

MR. BENJAMIN F. THORNBURG (Waltham).—I don't know, Mr. President, what happened at the meeting on December 9 at Lowell because I was unable to be present, but last June we had a meeting, I think, of seventeen representatives of the bar associations in Middlesex County. As a result of that meeting this federation was formed on the

basis of the American Legion and I think that every bar association in Middlesex County, with one or two exceptions, is in the association. It is our plan to eventually accomplish the same thing in the other counties and then make it state-wide. I cannot tell you the details of the constitution because I have not seen it.

THE PRESIDENT.—How many bar associations are there in Middlesex County?

MR. THORNBURG.—I think about eighteen at the present time.

THE PRESIDENT.—City and town, or what?

MR. THORNBURG.—Well, take our bar association; it is called the Bar Association of Waltham, Watertown and Weston, which is the jurisdiction of the Second District Court of Eastern Middlesex. It is the hope that we will have a bar association in every district where there is a district court in order to stimulate interest and have them join the Federation. In that way we feel that we can get every member of the bar in Massachusetts into this Federation, which we feel is necessary if it is to properly function.

THE PRESIDENT.—What became of the Middlesex County Bar Association?

MR. THORNBURG.—They have joined our Federation.* They are still functioning as a bar association, but they will have delegates to meet as they desire, the number of delegates depending upon the size of the bar association.

THE PRESIDENT.—Then if that is carried out, eventually the Massachusetts Bar Association will be a member of that association?

MR. THORNBURG.—Of the state-wide association.

THE PRESIDENT.—It would seem to me that it ought to be the other way about. If every one of the local associations in Middlesex were federated with the Middlesex County Bar Association you would have a ready-made organization right there. What you have done in Middlesex, it seems to me, is to form a new bar association.

MR. THORNBURG.—No, it is an association formed of delegates from every association in the county.

THE PRESIDENT.—Yes, including the county association?

MR. THORNBURG.—Yes.*

THE PRESIDENT.—I should be very much opposed to having the Massachusetts Bar Association become a member of some other federated association. It seems to me that the Massachusetts Bar Association must stand at the head of this organization and have all the others subordinate to and affiliated with it. That is my offhand notion.

MR. THORNBURG.—You must appreciate that this is a first step at the beginning and we are open to suggestions. We found that we could not do anything by sitting and waiting and I think we have made a step forward which eventually will culminate in something.

THE PRESIDENT.—Any other remarks on this subject?

SECRETARY GRINNELL.—I do not want anybody here to feel that they should not discuss this thing freely, entirely regardless of any individuals. It is simply a question of organization and structure of the bar and its relation not only to the problems in this community but to the problems of the American bar. The way in which any affiliation of the various bodies of the bar is to be developed will of course affect the position of the bar of the Commonwealth in the profession, which now is organized to a considerable extent in state organizations and representatives of state organizations, besides the large and growing membership of the American Bar Association, which has now become so large that it is unwieldy. I do not know what the ultimate answer to the problem of

*Mr. George P. Drury, who attended the Lowell meeting, states that this is an error; that it was suggested at the meeting at Lowell that the local associations be federated with the Bar Association of the County of Middlesex as the central organization; but the delegates present voted to organize their own federation, independent of the Middlesex Bar Association.

organization of the bar with a view to focussing the interest of its members on professional problems is to be, and it is just this kind of discussion which I hoped would come about as a result of throwing this subject into the meeting. If any of the members from other parts of the state are interested in this problem, I hope they will say something and that they will "take the lid off" if they wish to do so, regardless of any individuals.

MR. NATHAN P. AVERY (Holyoke).—I think what Mr. Nutter says is absolute common sense—that the Plan I here is unworkable and absurd. You have got to recognize facts as they are. Now the Middlesex people have done what I think is inevitable. I think a good many lawyers outside of the Boston Bar Association feel that the leading lawyers down here in Boston do not care very much about anybody outside of Boston, or about the profession of the law so far as the protection of that profession goes. They have their own interests and they clean their own house very thoroughly and effectively, and they are a splendid body of men. But the lawyers outside of that association and some members inside that association I do not think are going to be patient very much longer and see some of the practices go on in this state as they have gone on. That is the reason why this Middlesex movement has started, and you may have other movements started just like it. There are a good many lawyers who are members of the American Bar Association—and I am one of them—who think that that is at present an organized league of corporate interests, and that there is not going to be much help to the bar and to the lawyers of this country from the American Bar Association. Now I believe in the federation idea; that is, that we should have some kind of an advisory council of all the bar associations of the state. I believe that this association here should be the parent and should be the organizer of it, because the Massachusetts Bar Association really stands for the Commonwealth. You have got to have that state-wide organization, because when you undertake to influence public sentiment a state-wide organization and the country lawyer can touch public sentiment a great deal quicker than a centralized big-city organization. The big-city organization is domineered largely by able and leading lawyers who represent great corporate interests and it does not touch the popular pulse. It is the man out in the field who calls people in his community by their first names and who knows intimately the legislators that really can get down to bedrock and do things if things have to be done. So I believe that you have got to discard and throw into the wastebasket the first plan here. You cannot have any plan that involves compulsory membership in the Massachusetts Bar Association. That has got to be voluntary. In Hampden County we charge the boys $5 a year. Some of them in these times have hard work to raise even that. Now you cannot tack on $5 more to those fellows up there to have them become members of the Massachusetts Bar Association. You can get up in our meetings and talk about the Massachusetts Bar Association and ask them to become members. A lot of them are willing to become members because of the work of this association. It seems to me that the thing has got to be voluntary all along the line. If you can get an advisory council in which every legitimate bar association in the state will have a voice to advise where it can advise and to help where it can help, that is about as far as you can go at the present time. But I think that any federation ought to come from this organization here. In Hampden County we want all the help that we can get from the Middlesex County organization and we are willing to give them all the help that we can give, but we are not willing to come under their banner on a state-wide advisory council. We are going to follow the Massachusetts Bar Association and we think we have got to lead off down here in this organization.

SECRETARY GRINNELL.—Mr. Chairman, there is one thing I would like to say in regard to the second plan that was suggested. There was

no idea in it of any compulsion whatever. The only idea of automatic membership from the local association into the state association was the elimination of the special red tape of going through the Membership Committee. In other words, a certificate from the secretary of the local association and the payment of $5 would accomplish admission to membership, but of course it would be purely voluntary.—It would simply make it easier and would make membership in the local association an automatic avenue, a sort of escalator, but no compulsion whatever.

MR. JOSEPH WIGGIN.—Mr. President, my experience with this federation movement in the last year has convinced me that it is going along in some fashion and we can either work with it or it will work along by itself. I think the people that are most interested in it are somewhat impatient of the delay, as is evidenced by what took place up in Lowell on the 9th of December. So far as I know, the Middlesex Bar Association has not had brought before it in any form the matter that took place on the 9th of December—

A MEMBER.—No, it has not.

MR. WIGGIN.— —and I am quite sure that the Middlesex Association has not yet joined the federation that was formed at that time.

MR. THORNBURG.—Well, Mr. President, at the meeting we had in June there were two delegates from the Middlesex Association who had been appointed to attend;* and I was informed, although I was not at the meeting in Lowell, that the Middlesex Bar Association had joined. The first consideration we gave to this matter was that we had two members of your committee address this meeting that we had last June, and from their remarks we were satisfied that the Massachusetts Bar could not go ahead and take the initial step. That was from some members of the present committee on this question of federation. So that we felt that if the Massachusetts Bar could not go ahead and take the initial step to have this federation, we would have to do it ourselves, and that is what we have done. If it is going to mean eventually that we come into the Massachusetts Bar, we do not care as long as we have a federation of the lawyers. We think it is necessary today.

THE PRESIDENT.—May I ask why you could not have federated with the Massachusetts Bar Association instead of forming a new organization that we never heard of before? Why couldn't you have federated with our organization?

MR. THORNBURG.—I don't know how long ago your committee on this federation of bar associations was appointed, but quite a long time ago a member of the Massachusetts Bar Association who was on a committee with, I think, the present president of this association, made a report to this Bar Association on this same subject, upon which report nothing was done; and we felt if the Massachusetts Bar Association was not interested enough to go ahead, that perhaps if we went ahead and formed this federation it would eventually work into the Massachusetts Bar. We felt that we had to take some step, for we could not go along and do nothing. So we hope that what we have started will work out eventually into a federation, whether under the Massachusetts Bar Association or under the organization we have started along the lines of the American Legion, and we do not care as long as we get it.

THE PRESIDENT.—We certainly hope that federation will be brought about, as we believe it will. I do not think it is fair to say that the Massachusetts Bar Association had lost interest in it. So far as I know,

*Mr. Drury says: "It is true that at a meeting of the Bar Association of Waltham, Watertown and Weston, held in Waltham in June, 1931, the Bar Association of the County of Middlesex was invited to send a representative, who was present merely as an invited guest. Nobody was present at the Lowell meeting as a representative of the Bar Association of the County of Middlesex. No suggestion has ever been made to that bar association that it join the federation. It is not eligible for membership in the federation. Section 3 of the constitution of the Federated Bar Association of Middlesex County reads as follows:

"'The Association shall be composed of the members of such *local* Bar associations in Middlesex County as shall ratify and adopt this constitution.'"

there was never any interest expressed in the matter until we started it, and that was only a year ago. At that time we brought together from various parts of Massachusetts the informal gathering together which appointed a committee, and some members of that committee addressed various associations. Apparently what the member of the committee said to the Middlesex lawyers was productive of fruit, but instead of federating with the Massachusetts Bar Association, which I am sure he thought was what he was accomplishing, you created a new association which never existed before and you federated with that. According to the letter that you sent to Mr. Dangel, you expect eventually to swallow the Massachusetts Bar Association too or have it affiliated with your organization. It seems to me that never can be done. It seems obvious that if we are going to have a dominant bar association in any state, it must be a state association. It would be an anomalous situation to have the Massachusetts Bar Association affiliated with some other kind of association within the boundaries of the state and make that the dominant association. It would cease to be the Massachusetts Bar Association the moment that happened, it would seem to me. May I ask Mr. Thornburg what the plan of federation is? Does each local bar association send delegates to your new association?

MR. THORNBURG.—I have not seen the constitution, as the chairman of the committee appointed to attend that meeting has not turned it over to me, but as I understand it, each bar association, depending upon its size, has, if I remember correctly, one delegate for every twenty-five members. So far as what we have done is concerned, it does not need to worry the Massachusetts Bar Association, because if we have a hundred members in our own present bar association, if this thing goes through, then four of our delegates will be members of the Massachusetts Bar Association.

THE PRESIDENT.—What I cannot understand is, why you interpose another association between your local associations and the Massachusetts Bar Association. Why couldn't you affiliate directly with our association in the same way in which you are affiliated with this new organization?

MR. THORNBURG.—Because we wanted to have some organization of bar associations that could work in unison with all the bar associations, and we felt if we got it going we could then make it more state-wide. It may be a temporary arrangement to get the interest worked up and get the Federation going.

MR. MACMASTER.—May I interrupt again, briefly? As I recall the discussion in the inception of this matter, in a meeting held, I think, in these rooms, the substance of the discussion at that time as it rests in my mind was that we wished to avoid creating a new organization. We felt that perhaps there were already organizations enough, considering the national organization, the state organization, the various county bar associations and the district bar associations. So our thought, I think, at that time was that we should cooperate through this committee with organizations which were already in existence and not create a new body. It was too coordinate and to cooperate with the associations which were already in existence. Is that the way it rests in your mind, Mr. President—the substance of our discussion?

THE PRESIDENT.—Yes, exactly.

MR. MACMASTER.—That is the theory that I think the committee has tried to work out. There is no mystery about Plan I or Plan II or any other plan. Our only purpose, speaking unofficially for the committee, would be to try to work out some adequate scheme of coordination.

MR. NUTTER.—Mr. President, I think you have got sooner or later to face the question of units. I don't know how many units there are. You begin with the American Bar Association; then you go to the state bar association, then you go to the county bar association, and now I see that every town has a bar association and I do not see any reason why the district court of that town should not have a bar association, and

some time or other you have got to stop with the kind of unit. Now I would like to affiliate with everybody, but with all respect to the City of Waltham, the Massachusetts Bar Association and the Bar Association of the City of Waltham, while mutually sympathetic, are not really on the same basis, either in membership or in money. I do not see why the Massachusetts Bar Association should be affiliated with the Bar Association of Waltham and not the Waltham with the Massachusetts; neither do I quite see why there should be any scheme of county affiliation in which the county association is only a member with the bar association of every town in that county and every town with every district court. You have got to have a unit somewhere.

THE PRESIDENT.—The natural thing, it would seem to me, would be for each group of towns over which a district court exercises jurisdiction to have a local association. Those various local associations might be affiliated to the county bar association and the county bar association with this one. That would seem to be the way to do it. And then in any city which was large enough to have a city association of its own, perhaps that could affiliate directly with the association of the county in which that city was situated. I agree with Mr. Nutter that it is rather an anomaly to have the Massachusetts Bar Association or a county association affiliated with an association which to begin with is merely a county association. Any association purporting to speak for the Middlesex bar, for example, it would seem to me would have to be the Middlesex County Bar Association, and not some other association in Middlesex with which the Middlesex County Bar Association would be asked to affiliate. I imagine that the Middlesex County Bar Association might suggest that instead of this new organization swallowing it, it should swallow the new organization and have the new organization affiliated with the Middlesex County Bar Association.

MR. HARRIS M. RICHMOND.—Mr. President, Mr. Wiggin has stated —and, by the way, he is a vice-president of the Middlesex County Bar Association—that he does not know of any delegates being appointed to attend the meeting of the new organization. I have been a member of the Council of the Middlesex Bar Association a number of years. I missed a meeting in June and also in October, but certainly this was not brought up at the November meeting or at the December meeting, which occurred a few days after the meeting in Lowell. I think that officially there were no delegates. It is quite possible that some of the members were there, or some of the members of the Council, but if so they were there individually.

SECRETARY GRINNELL.—The tables are ready for lunch. I think this discussion has accomplished the object for which it was inserted in the program of the meeting, and that was, to bring the whole situation before the bar in such a way that we could all understand it better. I have learned this morning for the first time that there are seventeen or eighteen bar associations in Middlesex County. I thought there were only about eighteen in the entire Commonwealth. I don't know how many other counties have seventeen or eighteen bar associations. If that is the case it raises a new aspect of the problem of detail in any plan of organization and affiliation. I think, on the whole, we have got a considerable amount of suggestion as a result of this discussion which will help any committee in considering it. I think we are not ready for definite action of any kind and that the executive committee of this association and the informal committee of representatives of associations can continue to function in the light of this discussion, the substance of which can be printed in the QUARTERLY for the information of the entire membership of the association.

MR. JOSEPH P. MCMANUS.—Last year at the meeting here, I believe, so far as my memory goes back, I was the only one to touch upon this matter, in so far as I said that I was glad I had only been a member a short time, a few years, but I did not know what it amounted to to be a member of the Massachusetts Bar Association, in my contact with

attorneys day in and day out, in the court houses and elsewhere. I did not hear the discussion of Mr. Nutter, but reading over these two plans last night, with what knowledge I have of organizations—in which I know our President is very well versed—to my mind, Plan I with some alterations, it might be very workable. In the first instance I do not think any of us should be members of the Massachusetts Bar Association. We could all be members of some local association which might be of our choice, either in Boston or, if we live outside the city, then of the bar association of some other locality; and then through those associations the per capita would be paid to the state association, which would be the Massachusetts Bar Association. In other words, every member of a bar association in the state, whether in Lowell or elsewhere, would be a member of the Lowell Branch or "local", as we might term it, of the Massachusetts State Association, or the Boston Branch or local, etc. We would elect delegates to the parent body and at all times the Massachusetts Bar Association would be the parent body, similar to the American Federation of Labor, which has its headquarters in Washington with Mr. Green as president, but which in itself would be a nonentity if it were not for the fact that delegates are sent from the different international and national bodies affiliated with the American Federation. Each of these affiliated bodies would be a nonentity similar to the American Federation of Labor were it not for the fact that they are supported by the locals of the different trades, from the highest skilled mechanic down to the lowest laborer in the state, all of whom have their own organizations, each affiliated in the federation of the state where they are and the state federation affiliated with the American Federation of Labor. That is the way, in my opinion, that the American Federation of Lawyers should be organized; that the state federation of the lawyers would in turn be supported by each and every local association in the state and a per capita tax or dues be paid to the parent body. It is so plain to me, having represented certain organizations for many years along these same lines, that that was what prompted me to speak on this subject a year ago at this place. As to Plan II, I think it is objectionable because it allows three different kinds of members—the Massachusetts Bar Association member, the associate member who is not a member of any local federated association, and the federated member—three different classes in one body. With so much intelligence wrapped up—"not a cough in a carload" as it is said—I see prominent former attorney-generals sitting around here and other prominent attorneys—the big shots of the association around Boston, that Brother Avery referred to—they must have the brains to formulate a plan which would be workable and would make this association what it should be, one of the highest associations in the country to look up to. But I want to say, Mr. President, that I am in favor of a plan similar to Plan I with certain changes, striking out certain provisions. Plan I could be put into a workable plan similar to the plans of the American Federation of Labor, giving us a Massachusetts Federation of Lawyers, affiliated with the parent body all over the country.

THE PRESIDENT.—I am sure the committee will be glad to have your views, Mr. McManus.

MR. T. M. HAYES (Greenfield).—I think that this discussion has brought out the importance of the subject matter that we are discussing. As I understand, there is now a committee working on it. It seems to me it is too important for us to make any hasty decision, and it occurred to me that a motion would be in order that the present committee be continued and the investigation by the committee be continued with a view to some early decision. I think after listening to this discussion this morning it is perfectly obvious that if we do not start doing something somebody else will. It seems to me it is time for action. I move that the present committee continue its services and report some definite action as soon as is practicable.

MR. ALFRED R. SHRIGLEY.—Second the motion.

THE PRESIDENT.—You heard the motion, that the committee continue and report as soon as may be. Any remarks?

(The motion was carried unanimously.)

MR. WIGGIN.—Are you further interested in what took place in Lowell on the 9th?

THE PRESIDENT.—You mean, is the association interested? I think we are.

MR. WIGGIN.—I can tell you a little of it. I have received this morning a letter from Mr. George Drury, who was present, and I will read a portion of it. And then I have here a copy of the constitution which I will leave with the Secretary so that he can read it.* Mr. Drury received a personal invitation to attend and did attend the meeting on the 9th. There were present from Lowell, Cambridge, Waltham, Woburn, Framingham and Marlboro seventeen persons in all. Richard B. Walsh, president of the Lowell Bar Association, presided. The officers elected were Richard B. Walsh of Lowell, president; vice-president, George F. McKelleget of Cambridge; executive committee, Henry J. Winslow of Cambridge, John A. McCarty of Waltham, Charles A. Flagg of Framingham, Edward T. Simoneau of Marlboro and Robert Johnson of Woburn. The original impetus for this Federation came from a talk at a meeting at Waltham six months ago. Nothing came of that meeting and the Lowell men started up on their own initiative, because, as they say, the Middlesex Bar Association is not well represented before the Legislature and because the unlawful practice of the law by laymen should be put down by prosecution.

---

*CONSTITUTION OF THE FEDERATED BAR ASSOCIATION OF MIDDLESEX COUNTY

ARTICLE I

SECTION 1. This association shall be known as the Federated Bar Association of Middlesex County and shall be perpetual.

SECTION 2. The purpose of the association shall be the promotion of all matters pertaining to the administration of justice and the welfare of the members of the bar.

SECTION 3. The association shall be composed of the members of such local bar associations in Middlesex County as shall ratify and adopt this constitution.

SECTION 4. The members of local bar associations hereafter organized may be admitted by the convention of delegates into this association.

ARTICLE II

SECTION 1. All powers of this association shall be vested in a convention of delegates, which shall be the judge of the appointment and qualifications of its members.

SECTION 2. The convention of delegates shall be composed of delegates chosen on or before the first day of January of each year by the several local bar associations. Each association shall choose one delegate for every twenty-five members or fraction thereof, but each association shall have at least one delegate.

SECTION 3. The convention of delegates shall assemble at least once in every year, and such meeting shall be on the first Monday in February, unless they shall appoint a different day.

SECTION 4. The majority of all the appointed delegates shall constitute a quorum; but a smaller number may adjourn the meeting. The convention shall cause a journal of its proceedings to be kept and the vote of the delegates on any question, shall, at the request of one-fifth of those present be entered on the record.

ARTICLE III

SECTION 1. The convention of delegates shall annually elect a President, a Vice-President, a Secretary and a Treasurer, who shall hold office for a term of one year, and until their respective successors have been elected, and shall have the powers and duties usually appertaining to their respective offices.

SECTION 2. The President shall have the power to appoint from among the members of this association such committees to assist him in the execution of his duties as he shall deem necessary.

SECTION 3. The President shall from time to time recommend to the consideration of the convention of delegates such matters as he shall judge necessary and expedient to advance the objects of the association; he shall have the power to call together the convention of delegates whenever, in his judgment, there is occasion therefor, and he shall so call them together, upon the written request of one-fifth or more of the delegates.

ARTICLE IV

This Constitution may be amended by a majority vote of the convention of delegates.

ARTICLE V

SECTION 1. The ratification of three regularly organized Bar Associations, shall be sufficient for the establishment of this Constitution between the Bar Associations so ratifying the same.

"I suggested that the Federation"—this is Mr. Drury's letter—"ought to be through the existing Middlesex Bar Association, but the chairman of the meeting and others present were strongly of opinion that the Federation should start out on its own and leave the matter of consolidation with the Middlesex Bar Association to some future time." It was felt that the matter of grievances might be left with the Middlesex Bar Association; that "the younger members of the bar should assert themselves by organizing local bar associations and have them federated throughout the county. The goal apparently is a local bar association in every judicial district except possibly in judicial districts where there is no city or town around which the bar may rally as a center. The activities of banks and trust companies in connection with legal business were mentioned, but equal stress was placed upon the activities of laymen in drawing wills and appearing in court by a power of attorney."

THE PRESIDENT.—What is the name of the association, Mr. Wiggin?

MR. WIGGIN.—It is the Federated Bar Associations of Middlesex County.

THE PRESIDENT.—Some one who has come here from a distance may have something he wants to say, so that we will meet again after lunch is over.

(A recess for luncheon was then taken.)

The meeting was called to order by the President at 2.15 p. m.

THE PRESIDENT.—Mr. Rosenthal of Pittsfield had something that he wanted to say to the association.

DISCUSSION OF EDUCATIONAL OPPORTUNITIES FOR THE PRACTISING LAWYER.

MR. JAMES M. ROSENTHAL (Pittsfield).—Mr. President, I hate to inflict myself on the association, but there is a matter that has been running through my mind for the last two or three years. In fact, I wrote a little article about it and submitted it to the LAW QUARTERLY, but in the interest of that high standard of editorial excellence that we heard about this morning, it was rejected, quite properly.

We have heard a great deal in Massachusetts about the standards of the lawyers, particularly in reference to the matter of their education. Those remarks, however, have all been delivered from the point of view of the education of the man about to enter the bar, the man who takes his bar examinations. There has been very little said—in fact, nothing that I have seen—about the education of the practising lawyer. To my mind that is as important as, if not more important than the matter of the education of the young man about to enter the bar. After all, the young man is a young man. People look more or less askance at him and he is not entrusted with the most important affairs. But it is different after he has passed the bar examinations and has been practising for a number of years. It is then considered that by virtue of the fact that he is a lawyer and has had that number of years' experience, he is a man proper to entrust with matters of more or less importance and complexity.

I have often compared the activities from the standpoint of study of the practising lawyer and the practising physician and the practising dentist. I come from the western end of the state and what I say may not be at all applicable to the east. I say it from the standpoint of Berkshire County. There the medical society and the dental societies are active in keeping abreast, and in aiding their members to keep abreast, with the progress of their profession. Their societies do something more than meet once a year or have a dinner, exchange felicitations and attend each other's funerals, which is about the extent of the activity of the local bar association. They have clinics which they attend. Professors come from the various medical and dental schools and give them lectures. They themselves go away, and it is considered

the proper thing for a man who is a progressive physician or progressive dentist to give up temporarily—it may be only for a day, it may be a week or it may be a month—the practice of his profession and go to some hospital, listen to some lectures, attend some clinics. It is not unusual for the members of the professions—I particular notice that in the dental profession—to gather together, each to pay a fairly substantial amount of money, from ten to twenty-five dollars even, and hire somebody to come to them and give them either a lecture, a demonstration or a series of lectures. I noted in the report of President Lowell a couple of years ago that the Harvard Dental School in connection with the University Extension Department of the Commonwealth was engaged in giving a series of lectures to practising dentists on their profession.

We have nothing at all of that nature among the lawyers. It seems that we cease a systematic study of the law the moment we leave the law school or pass the bar examination. Of course we have our law magazines, excellent magazines, the various law reviews issued by the law schools, the QUARTERLY, the *American Bar Association Journal.* But there is nothing systematic about that.

Those of us who have been out of law school for as much as twenty years must realize the changes in the law that have been brought about both by economic conditions and by fundamental inventions, such as the matter of aircraft and the radio, which have brought into being a new type of law concerning which we knew nothing when we left the law school, because there was no occasion for us to know anything, and the various economic changes, the income taxes and all the new types of taxation, concerning which, again, we received no instruction in the law school, because prior to 1913 there was no system of Federal taxation. Whatever we know about that we have to pick up in a haphazard fashion and by ourselves. We are not for the most part rendered assistance in our bar associations or our law schools.

For fourteen years I have been attempting to persuade the law school from which I graduated to give short courses for practising lawyers either in the summer or at some other time. I have not been able to persuade them that that is part of their function. I note that one law school in this Commonwealth, one university law school, the Boston College, is doing just that. It has an extension school—I have a pamphlet here—giving professional courses for lawyers, in which they advertise courses on Federal jurisdiction and practice, legal bibliography and research, and various other things. But that is an unusual thing.

I have been attending meetings of this association off and on for fifteen years and I note that the attendance here is comparatively small in comparison to the attendance of the state meetings, I am told, of the medical societies and the dental societies. We were told today that only one thousand out of eight thousand belong to this association, and of that only fifty have enough interest to attend this meeting.

What I would like to bring to the attention of the association is the possibility of this association doing something to bring about the systematic study of law,—of Massachusetts law, of Federal law. We in Western Massachusetts, for instance, who are not in close touch with the Federal courts, know very little, can know very little, about Federal procedure. I think that the Massachusetts Bar Association in connection with the local bar associations and in connection with the Massachusetts university law schools, should do something to aid those lawyers who wish to engage in the systematic study of law. It might be by short courses at some law school. It might be by sending lecturers throughout the state to give courses. It might be by correspondence school methods. There are any number of methods. But I do think something should be done in that line.

Three or four years ago the president of this association in the course of his presidential address said that the standards of the Massa-

chusetts lawyers are below what they were forty years ago and are still falling. I think that statement was inaccurate. I do not believe that is true. But I do believe that much can be done to increase our standards by the matter of study for the progressive practising lawyer. To that end I would like to offer this resolution:

Resolved, That the executive committee and the committee on legal education be directed to consider the question of aiding the members of the Massachusetts bar to continue in a systematic manner the study of the law, and report on the advisability of requesting the various university law schools in Massachusetts or the Department of Education of the Commonwealth through its University Extension Division to join with the Massachusetts Bar Association and such local bar associations as care to cooperate in providing courses adapted to such purpose.

MR. BAILEY.—I second that resolution. The City of New York Bar Association of which I am a non-resident member has a course of lectures during the winter, at least half a dozen, by distinguished lawyers and judges, in which they undertake to give a serious discussion on law subjects of importance, showing that it can be done to that extent, at least.

MRS. JENNIE LOITMAN BARRON (Boston).—I think the resolution is a very excellent one, and I think we would find that the Department of Education, University Extension Division, would be very glad to give such a course, not perhaps given by one particular person, but a course such as has been given in real estate law, by different members who are eminent in their particular field of the profession, and I think if there was any demand by our association or by any group of attorneys for such a course, arrangements could be easily made which would entail no expense whatsoever to the organization or to those who are interested.

THE PRESIDENT.—I am heartily in favor of this resolution myself. It occurs to me, however, that there are reasons why medical practitioners, dentists and the like are interested in their professions apparently to a greater degree than the practising lawyer in his profession. One reason for that is that there is progress in dentistry and in medicine and in science far exceeding the apparent progress that is going on in the profession and science of the law. The dentist of today is not using any of the tools that dentists 25 years ago used. That is, he may be using some of the basic tools, but the technique of the profession has altogether changed and it is almost necessary for those men, if they are to keep abreast of the profession, to have the new things explained to them and to keep up with the progress in that particular science.

But I do not believe there has been such progress in the science of the law. That is one of the criticisms of it, that we are lagging far, far behind the procession, and that the technique and the procedure of the law as we have it today, for example, in Massachusetts, is still 25 or 30 years—a whole generation—behind the point where it ought to be. Perhaps that is because there is nothing new in the law. The only new field of the law that I can think of within the last 25 years, if you lay aside aviation, is in labor law, which has really been the only unexplored field. When the court started in about 25 years ago to issue injunctions in labor disputes, in that field there was opportunity for a great many new decisions and the application of old principles to new sets of facts. But surely, there the courts without the benefit of many statutes have been charting a new course in labor law. Maybe they will in aviation law or maybe the advancement of science will make it necessary for the courts to do something to keep abreast.

But in medicine and dentistry and such sciences, that are constantly being improved from a mechanical standpoint—I mean by that, by the invention of mechanical appliances—it has become necessary for the practitioner there to have lectures or to go some place where he could learn what was the latest tool that was to be used in his profession. But in the legal profession we have not invented new tools. We still

have the same old things, and we try to apply them to new facts, and I think perhaps they are too cumbersome and too old. It may be that a course of lectures such as this is just what we want so we can slough off some of the old outworn procedure and take our place in the van with the others.

I certainly would like to see that happen and I hope this resolution will be productive of that end.

MR. WELD A. ROLLINS (Needham).—I would like to ask the gentleman if he has any more concrete ideas. Could it be done by radio?

MR. ROSENTHAL.—I don't think so. I wanted a course not for the public, but for lawyers, practising lawyers.

It has been said that there is nothing new in the law. I doubt it. I am thinking particularly of procedure. You can get substantive law pretty well through books, but you cannot get procedure except by going through the course, having the actual business or having something of the nature that seems like actual business, like a practice course. Take the matter of the Interstate Commerce Commission, the matter of the Federal Trade Commission, the matter of the Federal Board of Tax Appeals. What does the ordinary lawyer who graduated from law school as much as twenty years ago know about that procedure? Practically nothing. And if he wants to do his duty by the community, he should know something, and it seems to me it is the duty of the profession—you cannot force it on anyone if he doesn't want it—to give the opportunity to the lawyers.

You asked me in what way it can be done. It might be done by short courses at law schools. It might be done by sending lecturers throughout the Commonwealth, meeting weekly or monthly for a certain period. It might be done through correspondence. Those are three possible ways.

THE PRESIDENT.—Of course, those three things that Mr. Rosenthal has mentioned are not law at all, really. You do not have to be a lawyer to practice before those three boards. Yet it is a fact that the lawyer who does not make a specialty of it does not know anything at all about it. Those are new tribunals which to a certain extent perhaps are encroaching upon the law field, but accountants and experts in that line are allowed to practice before those three boards,—tariff experts, economic experts, and so on. It really is not pure law.

The resolution was adopted.

DISCUSSION OF SUGGESTED LEGISLATION REGARDING TRUSTEE PROCESS.

MR. MCMANUS.—If I am in order, I would like to present a matter that has come to my attention a number of times by way of trustee process, where you are successful in tying up somebody's money, which is the real thing you are after in any suit for your client, and then the defendant, who is sometimes actuated by certain motives not to be honest and pay his legitimate bills, will have you ordered before a master in chancery and have two sureties present with property to put up. If the master in his judgment finds over your objection as to the equity that might be left in that property over and above the amount of the *ad damnum*, that there is sufficient equity, he will file his bond in court and then dissolve the attachment of the trustee, and then the property is sold, and then the judgment amounts to nothing, because they dispose of their money in some way; the property has been disposed of, and there is nothing left. I thought through the past year when this meeting arrived that I would suggest that instead of one individual going to the Legislature with a bill, if the legislative committee of the Massachusetts Bar Association were instructed by this organization to have some sort of a bill drafted to have that property that is put up for a surety become a lien against that property, the same as a mortgage, so that any future purchaser of that property would have notice, it would in

some degree benefit the plaintiff and would not be helping these defendants or these people who do not want to pay honest bills. It is a matter that I think this association could by its membership and by the prestige of the association, if such a bill were introduced, have a lot of weight as against the introduction by any individual member of the bar. I will make a motion, Mr. President, to that effect, that the legislative committee be instructed to prepare some kind of a bill for the purposes outlined in my remarks.

SECRETARY GRINNELL.—Mr. Chairman, I am not a member of that committee, and I have no objection to any reference of the subject to them. I think that it would better be left to them for consideration rather than with definite instructions, because the whole subject of trustee process under the statute is such that to instruct that committee to draft a bill for the one particular purpose of making the dissolution of an attachment by trustee process more effective for the protection of the plaintiff seems to me rather a difficult or doubtful matter to instruct them so definitely about. There are a good many criticisms of the existing practice of trustee process. Some of them have been brought before the Judicial Council from time to time and that council has not yet taken up the subject. Whether they will or not during the coming year I do not know.

I think that this suggestion of Mr. McManus should be in the form of a request that they consider the matter rather than that they be instructed to draft a bill in favor of a particular plan, because I have found that, when certain general suggestions are made, however desirable they may appear, when you get down to the work of drafting a bill which will work, it is a very different picture and a difficult thing to do. I should merely suggest that the word "instruct" be changed to the word "consider", which would include, I take it, any authority to submit a bill if they were able to frame one which seemed advisable.

MR. ROLLINS.—Mr. President, I move an amendment to the motion, that the leglislative committee be instructed to consider the question presented.

The motion was seconded.

MISS GRETA C. COLEMAN (Boston).—When the same situation arises for the dissolution of any other attachment, why should it be confined to a trustee attachment?

MR. MCMANUS.—I am glad this is opened up. I am willing to accept any amendment. The remark of the last speaker might be true. I would be quite in accord if the legislative committee thought wise to draft a bill that any person who offers any property as collateral or as surety to release any attachment by way of trustee or any other process, that they offer that property the same as in criminal bail bonds, so that that property should have something attached to it to insure the party, whether it is the Commonwealth in a criminal matter or an individual or a corporation in a civil matter. I am satisfied that the committee will consider the advisability of drafting some kind of a bill to protect not only the state, but an individual, a partnership or a corporation. There are too many of these people. I have had them myself. I know one case of property assessed for $37,000, mortgaged up to $35,000, the taxes not paid, and then the master says that there is an equity of so much, that the property is worth fifty or sixty thousand dollars, when anybody knows in the condition of the market today that the property would not bring thirty thousand, and when they say it is worth fifty thousand, they couldn't get it. So I am satisfied with the amendment. It may start something to stop this practice of those people, and they are right around Boston. Whether they are around the western part of the State I don't know, but that sort of procedure is practiced very much around Boston, where they swap property and shift it back, and originally get it for ten thousand, and before they are through, they are selling it back to each other for thirty or forty thousand.

THE PRESIDENT.—Then the question comes on the amendment which

has been accepted by the maker of the motion, that this matter be referred to the legislative committee for consideration and for further report upon the advisability of drafting a bill.

The motion was carried.

DISCUSSION OF PROPOSED LEGISLATION REGARDING INTERROGATORIES.

MR. BENJAMIN F. THORNBURG (Waltham).—Mr. President, I am not a member here, and if I am out of order I would like to be told. But I would like to have the opportunity of sending the Massachusetts Bar Association a copy of the bill which I filed last year relating to interrogatories. It is a bill that will save time for lawyers and also for the courts. The clerks to whom I have submitted it thought it was an exceptionally good bill and I would like to send it along to the legislative committee for them to take such action on it as they see fit. I have not got a copy with me.

THE PRESIDENT.—I think the committee will be very glad to accept it. Could you state in a few words the substance of the bill?

MR. THORNBURG.—Yes. The law regarding interrogatories at present, as you all know, requires that you file the interrogatories, but there isn't any law that I know of which requires the party filing them to send a copy to the opposing side. Then if they are not answered within ten days, you file a motion to default and generally you have to go to court, and over in Middlesex County on Friday mornings you will spend a couple of hours in getting a ten day order.

My bill would require that the party filing the interrogatories must send a copy to the opposing side. Then within fifteen days after that, if the interrogatories are not answered, the party filing the interrogatories would make an affidavit stating they filed the interrogatories in court on such a day, that they furnished the other side with a copy; a copy of that affidavit will be sent to counsel of record and the original would go to court. The clerk would take that, and if the interrogatories were not answered within fifteen days, he would automatically enter up a default. If during that fifteen days for any reason or no reason the counsel would desire further time, he could simply go into court on a motion and ask for further time. You will find in the actual working out of the scheme there will only be about one per cent of motions filed, where there are probably sixty or seventy per cent filed under the existing law.

I know Mr. Putnam over in Cambridge gave it a lot of consideration. He thought it was a wonderful thing, even if it meant the hiring of an extra clerk to take care of that, because that would save the time of the lawyers running to and from the courts, and also of the clerk taking out the papers from the files and making a trial list on them, and then the judges' time making the order.

SECRETARY GRINNELL.—Mr. Chairman, I do not remember the details, but my recollection is that that subject has been quite fully dealt with in the new rules of the Superior Court, somewhat along the lines that you have suggested, with some variation of detail, I think. At all events, I am quite sure that in the draft rules which were submitted by the committee on rules last February and circulated in the MASSACHUSETTS LAW QUARTERLY, there was a rule on that subject, with an extended comment on the rule by Judge Lummus, and the substance of that I think has been covered by the Superior Court rules. Those rules will be published so that the bar can obtain them very shortly because they go into effect on the first of January.

MR. THORNBURG.—Mr. President, that opens up the matter which I think ought to be taken care of by statute, because then you have one rule for the Superior Court and you have one rule for the District Court, and I think they ought to be uniform. It is just as you have different rules for your Superior Courts now. In Suffolk County if you have a case come down from the Supreme Court you can get an execution the

Monday following, but you cannot in any other county, and you have to wait until the first Monday of the following month. It seems to me better to take care of it by legislation and have the same rule for all courts, rather than one rule for the Superior Court and one rule for the District Courts.

SECRETARY GRINNELL.—I think the answer to that is that you have different procedure in the Superior Court from the procedure in the District Courts, as well as in the Municipal Courts. If you did not you would not be able to get trial in the District Courts for two or three months. Your courts are performing entirely different functions, really, in the different stages of the case, and you have got to have somewhat different rules as to the matter of time, at least, in the District Courts from those in the Superior Court. Personally, in matters of detail, I think that the making of practicable rules by the courts themselves as experiments, which can be changed occasionally, if they do not work, more readily than you can change statutory arrangements, is a sound plan, and while I do not object to statutes where they are needed, I think that in a matter of that kind, if the court will adopt rules they can work it out in such a way that it would be workable and more to the satisfaction of the bar. I think that it is so in this case, and I believe the court has already attempted to deal with it. Of course, the legislative committee would be very glad to receive any copy of a bill which you wish to send in.

MR. THORNBURG.—I might say further that Judge Cox of the Superior Court, passed on this bill and talked with the chairman of the committee heartily approving of the bill. My difficulty is that every judge and every clerk interpret rules of courts differently in every court. For instance, I have a case down in Quincy. I have to file a motion to get my interrogatories answered, I have got to go down to Quincy to get a ten day order on that, and under my bill I would not have to. We fellows out in the country that do a lot of practicing in the District Courts are not going to be helped a bit by the rules of the Superior Court. If it is a case of shortening the time and making it ten days instead of fifteen, that is up to your legislative committee.

SECRETARY GRINNELL.—Mr. Chairman, I was told the other day, I think, by some member of the District Court bench that some revision of the District Court rules was under consideration, and I think the same is true in some of the others, perhaps in the Municipal Court of the city of Boston. I think this new set of rules, supplemented by the annotations, has attracted the attention of the bar and the bench to the subject so that they are all considering the subject of developing and revising their rules. There is also, as you may know, a new administrative committee of the judges of the Probate Courts which was created at the last Legislature similar to the administrative committee of the District Courts, and it is hoped that they may be able to straighten out some of the diversity of practice in regard to the details in the Probate Courts.

DISCUSSION OF REPORT OF LEGISLATIVE COMMITTEE ON THE RECOMMENDATIONS IN THE SEVENTH REPORT OF THE JUDICIAL COUNCIL.

(The report of the Legislative Committee is printed above on p. 15.)

SECRETARY GRINNELL.—The Judicial Council report was mentioned in the notice of the meeting. Unfortunately, owing to the unexpected delay in printing, it did not get into the mails as soon as I hoped it would, so that it was only delivered in the mails in this part of the state I think yesterday morning or day before yesterday. The legislative committee has reported in favor of such recommendations for legislation as there are in it. I do not know that the members have had an opportunity to study the report sufficiently to have a discussion of it at this meeting.

MR. DUNBAR F. CARPENTER.—I wonder how the report of the Legislative Committee is left.

THE PRESIDENT.—The report of the Legislative Committee was accepted as read and placed on file.

MR. CARPENTER.—Does that carry with it the approval of the association?

SECRETARY GRINNELL.—Mr. Chairman, as I see it, it does not carry a vote of approval of the association because the members here have not really gone into the subjects covered by that report. I think it stands at present as the expression of the judgment of the legislative committee, and that judgment as shown in that report would be submitted to the Judiciary Committee of the Legislature with the explanation that it was a report which had been circulated, as it will be circulated very shortly, to all the members of the association throughout the state. That seems to me as far as we could go this afternoon, in view of the fact that there has been hardly time for the members to consider the recommendations in detail.

MR. ROLLINS.—When it has been accepted here today, why hasn't it been given the stamp of our approval?

SECRETARY GRINNELL.—I think, Mr. Chairman, that it is desirable, where a subject of this kind is to be submitted to the Legislature, that a mere formal vote without consideration of the details of it should not be taken by an association of this kind. I think the legislative committee wants to know whether the people who voted in support of a particular measure have really had an opportunity to consider it and what their vote of approval amounts to. Accordingly, it seems to me under the circumstances that it is wiser simply to accept the report and then to submit it in the QUARTERLY in print to all the members of the bar of the association, and then if they agree with it and wish to support the legislative suggestions there, they can indicate it to the legislative committee or to the Judiciary Committee of the Legislature, which may be even more effective than the indirect method, and in that way take such part in the legislative consideration as they wish, rather than to have a mere formal act of the association at this time. Of course we can, if you wish, go into the various recommendations in that Judicial Council report and discuss them. I am perfectly willing to stay here and go right through the report with anybody who wishes.

MR. FRANK H. LAWLER (Greenfield).—Mr. Chairman, it seems to me in the explanation it is a distinction made here without a difference.

SECRETARY GRINNELL.—Of course, the difference, I take it, is this, that in one case it is the expression of the opinion of the Legislative Committee and in the other case it appears to be the expression of opinion of the meeting of the association, and the latter is the thing that it does not seem to me we are at present in a position to give.

MR. ROLLINS.—Again, Mr. President, I say by accepting it here we have given it the stamp of our approval, and if no further action is taken it must go to the Legislature with our approval.

SECRETARY GRINNELL.—Mr. Chairman, I should not interpret it so as the result of the acceptance of the report. I do not so understand it, and I have never rendered any report to the Legislature on that basis as having the approval of the association, and I never would, because I do not think it is what "accepted" means, when you are dealing with such a subject as positive recommendations for legislation.

MR. LAURENCE CURTIS, 2ND.—Is it not desirable that the report should have the approval of the Massachusetts Bar Association before the session of the Legislature at which the hearings on the various draft acts and other matters will come up?

THE PRESIDENT.—Very desirable.

MR. CURTIS.—Having in mind that there does not seem to be much that is controversial in this matter and the fact that this body is willing to accept the report of its legislative committee, I wonder if it would not be proper even at this time to formally approve the report.

THE PRESIDENT.—I see no objection to it.

MR. CURTIS.—Unless the Secretary feels very strongly it should be done at a later time, I would like to move that this body approve the report of the committee on legislation.

THE PRESIDENT.—This is still a meeting of the association, and there is no reason why that may not be done now as at any other time, if that is the wish of the association.

MR. CARPENTER.—Mr. President, I was just trying to find out the status of the report, being a member of the legislative committee. I do not think it would be wise to pass any blanket vote on things that the members don't know anything about; I don't think it carries any weight at all. I think the suggestion that the executive committee consider it at the next meeting would be very much better than to go ahead now.

MR. CURTIS.—Mr. Chairman, I would like to withdraw my motion in view of the discussion.

THE PRESIDENT.—The motion is withdrawn. Do you want to substitute Mr. Carpenter's suggestion?

MR. CURTIS.—I would be glad to accept the substitute motion.

THE PRESIDENT.—The motion has been made and seconded to refer the matter of the legislative committee's report, which involves approval of the Judicial Council's report, to the executive committee.

The motion was passed.

DISCUSSION OF UNIFORM FORMS.

MR. CURTIS.—Mr. Chairman, there is one thing I mentioned last year. It does seem to me there is a great waste in printing, and in lawyers' offices and in many other ways in having so many forms. Take the probate practice, they have printed forms for almost every action taken in the court and have a different blank for each probate court, which it seems to me involves a duplication and a waste for everybody concerned. The same thing is true of the various papers used in the district courts and the Superior Court in different counties. Maybe it is a difficult matter to change, but it seems to me that that would be a useful thing to receive consideration. In order to bring it to a head, I would like to propose a motion that this body respectfully suggest to the Judicial Council that the matter of having uniform forms which can be used in the several courts, Probate, Superior and District, may receive consideration to determine whether it is feasible or desirable to make any change in the present practice.

MR. LAWLER.—I second the motion.

MISS SYBIL H. HOLMES (Brookline).—Would that go to the Judicial Council or would it be better to have it go to the group of probate judges now at work on the practice in the probate courts?

MR. CURTIS.—This came to my mind because Mr. Grinnell said this matter of the rules is receiving a good deal of attention. Possibly this is a matter that cannot be covered only by rules of the court; it may require legislative action.

SECRETARY GRINNELL.—Mr. Chairman, I can tell you if it goes to the Judicial Council it will probably go through the Judicial Council to the administrative committee of the probate courts and the administrative committee of the district courts, as they know more about the details than any others.

THE PRESIDENT.—The motion now is that it be referred to the Judicial Council for them to do with it as they see fit.

The motion was carried.

THE PRESIDENT.—Anything else? If not, a motion to adjourn is in order.

The meeting adjourned at 3.10 p. m.

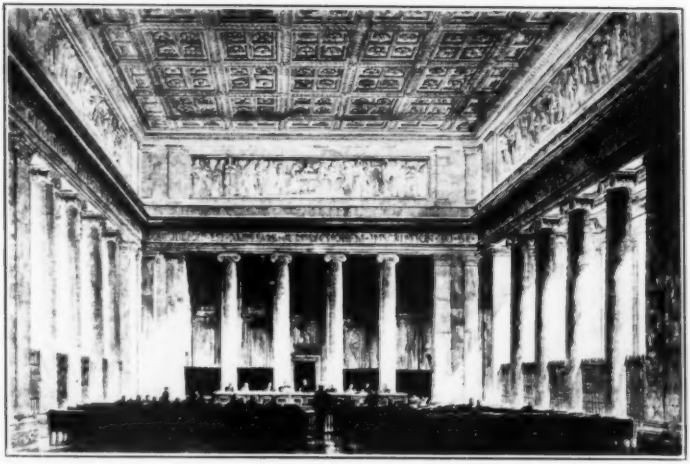
FRANK W. GRINNELL,
Secretary.

NOTE. At the request of the Executive Committee the President has appointed a committee to consider the relation of the state association to other bar associations.

Wurts Bro's, Photos, N.Y.

THE NEW BUILDING FOR THE SUPREME COURT OF THE UNITED STATES NOW UNDER CONSTRUCTION IN WASHINGTON

(*From the Architects Drawings*)



Wurtz Bro's, Photos, N.Y.

THE COURT ROOM

Wurtz Bro's, Photos, N.Y.

THE LIBRARY

THE RESIGNATION OF MR. JUSTICE HOLMES.

(From the Boston Transcript, January 12, 1932.)

To the President of the United States:

In accordance with the provision of the judicial code as amended, Section 260—Title 28, United States Code 375, I tender my resignation as justice of the Supreme Court of the United States of America. The condition of my health makes it a duty to break off connections that I cannot leave without deep regret after the affectionate relations of many years and the absorbing interests that have filled my life. But the time has come and I bow to the inevitable. I have nothing but kindness to remember from you and from my brethren. My last word should be one of grateful thanks.

With great respect,

Your obedient servant,

OLIVER WENDELL HOLMES.

THE PRESIDENT'S REPLY.

I am in receipt of your letter of Jan. 12th, tendering your resignation from the Supreme Court of the United States. I must, of course, accept it. No appreciation I could express would even feebly represent the gratitude of the American people for your whole life of wonderful public service, from the time you were an officer in the Civil War to this day—near your 91st anniversary. I know of no American retiring from public service with such a sense of affection and devotion of the whole people.

Yours faithfully,

HERBERT HOOVER.

THE CURRENT INVESTIGATION OF UNPROFESSIONAL CONDUCT IN ACCIDENT CASES UNDER THE SUPERVISION OF THE SUPREME JUDICIAL COURT.

Introductory Statement.

It has been frequently reported in the press that the current investigation was being conducted by the Massachusetts Bar Association. This is not the case. The investigating committee was organized last July independently as a citizens' committee. In order to avoid misunderstanding the history of the matter is given below.

F. W. Grinnell, *Secretary.*

At the meeting of the Executive Committee on March 23, 1929, after public criticism of the association by the Insurance Commissioner for failure to investigate alleged unprofessional practices of members of the bar in connection with the operation of the Motor Vehicle Insurance Law, the subject was discussed by the executive committee, and by the officers of the association. It was decided that the association was not sufficiently equipped with funds to conduct such investigation and no further action was taken in the matter. The relation between the activities of the association and its available funds is explained in the Quarterly for August, 1931 (pp. 31–36).

Previously, for the information of the bar, the report of Judge Wasservogel on the New York inquiry and the report of the Committee of Censors of the Law Association of Philadelphia had been printed in the Massachusetts Law Quarterly for November, 1928, and Supplement. Thereafter, the whole subject was discussed at some length in the Report of the Special Commission on Motor Vehicle Insurance, which was reprinted in the Quarterly for February, 1930.

Public criticism of the bar has continued by public officials and by the public press in connection with the insurance rate controversies and otherwise. Last summer, a Citizens' Committee was formed for the purpose of conducting an investigation. As explained in the address of the president, Mr. Mansfield, at the

beginning of this number, this committee consisted of members of the Governor's Safety Committee, of the State Insurance Department, of the Registry of Motor Vehicles office, of the Boston Chamber of Commerce, the Massachusetts Medical Society, of most of the insurance companies doing liability insurance in Massachusetts, and others. Mr. Mansfield was invited to join this committee and was made its chairman and Edgar P. Dougherty of the State Insurance Department was made secretary. The organization and purposes of the committee were publicly announced last July. As a result of the work of the committee thus far, a petition was recently filed in the Supreme Judicial Court and an order issued. A copy of the petition and of the order and memorandum submitted with it are printed herein for the information of the bar.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT. Suffolk, ss.

PETITION FOR AN INQUIRY BY THE SUPREME JUDICIAL COURT INTO CERTAIN FRAUDULENT PRACTICES, PROFESSIONAL ABUSES AND ILLEGAL AND UNETHICAL MISCONDUCT IN CONNECTION WITH THE SOLICITATION, PREPARATION, PRESENTATION AND DISPOSITION OF CLAIMS FOR PERSONAL INJURIES AND PROPERTY DAMAGE IN NEGLIGENCE CASES.

To the Honorable the Justices of the Supreme Judicial Court:

The petitioners, citizens of Massachusetts, respectfully represent that for some years past and especially since the taking effect of the compulsory motor vehicle insurance law in 1927, there has been constantly increasing public criticism by Governors of the commonwealth, commissioners of insurance, the attorney-general, members of the bar and laymen, and editors of the public press, of the unsatisfactory administration of justice in the commonwealth in connection with the solicitation, preparation, presentation and disposition of claims for alleged personal injuries and property damage.

Your petitioners are convinced that public confidence in the administration of justice is being seriously shaken and undermined by the common belief that unprofessional conduct among members

of the bar is common in connection with such cases, and that such conduct seriously affects the public welfare by clogging the court dockets, delaying the hearing and disposition of proper litigation, increasing public expense for the maintenance and operation of courts and clerk's offices, and also increasing the expense of the insurance companies in the preparation and defence of cases, and the amounts of judgments rendered therein.

For the purpose of investigating such fraudulent claims and unethical practices in connection therewith, there has recently been formed a committee of citizens, of which your petitioners are members. There are in the possession of this committee data representing a large number of cases, both pending and settled, which contain suspicious elements and circumstances and which seem to indicate that fraudulent or unprofessional practices have been resorted to in connection with them by lawyers, individually, or in collusion with other persons.

The practices and abuses which appear to be in common use in these cases fall into the following classes:

(a) claims for invented personal injuries to cover uninsured property damage;

(b) exaggeration of injuries;

(c) collusion between lawyers and motor vehicle owners and persons riding in their cars as guests to extort money for unwarranted claims;

(d) claims for injuries never suffered;

(e) concealment from claimants by attorneys of amounts received by them in settlements;

(f) unconscionable fees;

(g) co-operative collusive schemes and division of spoils between lawyers and others in connection with fraudulent or exaggerated claims;

(h) solicitation by lawyers directly or through "runners" or agents—a practice commonly described as "ambulance chasing," in violation of the code of ethics;

(i) lawyers appearing for both parties in claims arising from the same accident;

(j) cases of settlements by attorneys without knowledge of the claimants;

(k) unauthorized claims and suits brought by attorneys without knowledge or consent of claimants;

(l) other varieties of fraudulent or unethical professional conduct by lawyers in collusion with others in connection with motor vehicle cases and other claims arising from negligence cases.

The supreme judicial court being under the constitution and the statutes, the head of the co-ordinated judicial department of the government of the commonwealth has general supervisory jurisdiction over the conduct of the officers of the courts admitted to practice therein who have qualified by oath that they "will not wittingly or willingly promote or sue any false, groundless or unlawful suit nor give aid or consent to the same," and said court is charged with general responsibility for the conduct of its officers thus admitted and for the administration of justice. From the information presented to them and in the possession of the aforesaid committee your petitioners believe that all of the various abuses enumerated in the preceding paragraph exist in Massachusetts and are common among certain members of the bar, and therefore your petitioners allege that there is need for a prompt and effective investigation by the court of the alleged abuses in the administration of justice, to the end that the court may take such disciplinary or other action as "the court shall deem expedient in the interest of the public welfare" in the exercise of its constitutional powers.

The committee of which your petitioners are members, as described above, will have at its disposal funds sufficient to conduct investigations as may be necessary to carry out the inquiry, if authorized by the court, and to defray the necessary expenses of the counsel in presenting evidence to the court or to such officer of the court as may be appointed to hear evidence in such cases as the investigation shows should be presented to the court, and it is not expected that any expense will be incurred by the commonwealth or by any county therein except the usual fees of a commissioner or other officer who may be appointed by the court to hear such cases as may call for a judicial hearing.

Wherefore your petitioners pray:

That an inquiry be ordered by this court, to be conducted in such manner and by such appropriate procedure as it may determine, by a justice of this court or by such other officer as may be appointed, with adequate power to hear evidence in regard to prac-

tices in connection with claims for injury or damage connected therewith, to the end that the court may be informed in the premises and take such action as it shall deem expedient in the interest of the public welfare.

Signed FREDERICK W. MANSFIELD,
Chairman.

For the petitioners,

FREDERICK W. MANSFIELD,
EDGAR P. DOUGHERTY,
Secretary,
DR. FRANK M. VAUGHAN,
LLOYD A. BLANCHARD,
MORGAN T. RYAN,
HARRY F. STODDARD,
ELWYN G. PRESTON.

SUPREME JUDICIAL COURT.

SUFFOLK, ss. No. 29871 Law

IN THE MATTER OF THE PETITION FOR AN INQUIRY INTO CERTAIN FRAUDULENT PRACTICES, PROFESSIONAL ABUSES, AND ILLEGAL AND UNETHICAL MISCONDUCT IN CONNECTION WITH THE SOLICITATION AND DISPOSITION OF CLAIMS FOR PERSONAL INJURY AND PROPERTY DAMAGE IN NEGLIGENCE CASES.

ORDER.

This petition came before the court at this sitting and on consideration thereof it is ordered:

That the prayer in said petition be and is hereby granted, and an inquiry is directed into the practices alleged in said petition to exist in relation to claims connected with motor vehicle accidents, and claims and suits arising in other negligence cases, and into any other illegal or improper practices connected and related thereto; the said inquiry to be conducted by William Harold Hitchcock, Esquire, as special commissioner, with full power to summon witnesses, administer oaths, and to compel the giving of testimony and the production of books, papers and documentary evidence; that the petitioners are to supply one or more counsel to aid in the con-

duct of the inquiry; and said inquiry also shall extend to practices of any other persons acting with or in aid of members of the bar in carrying out the abuses alleged in the petition to exist, the expenses of the inquiry, other than the compensation of the special commissioner, to be borne by the petitioners.

The special commissioner may fix times and places for hearings and may hold such hearings without notice to anyone other than the petitioners and their counsel and the person or persons summoned as witnesses. He shall conduct all such hearings privately except that, in case any person whose conduct is under investigation requests a public hearing, he may hear such person's testimony in public in any suitable room in the Court House, Boston.

The special commissioner is further ordered to make to the court such recommendations touching the general situation or the disposition of any particular case as to him may seem advisable and to report his findings and recommendations to the court from time to time and as frequently as he may deem it necessary or advisable.

BY THE COURT.

MEMORANDUM IN SUPPORT OF PETITION FOR AN INQUIRY BY THE SUPREME JUDICIAL COURT INTO UNPROFESSIONAL PRACTICES IN CONNECTION WITH MOTOR VEHICLE ACCIDENT CASES.

General Laws, Chapter 211, Section 3, provides that "the Supreme Judicial Court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue writs of error and . . . and all other writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and the regular execution of the laws."

Members of the bar are "officers of the court" all of whom have qualified upon admission by taking the oath set forth in G. L., Chapter 221, Section 38. They are individually and collectively subject to "inquiry" by the court upon its own motion or upon information presented to it by members of the bar or other citizens. (See Matter of Casey, 211 Mass. 187, at pp. 191-193, Matter of

Cohen, 261 Mass. 484, Matter of Ulmer, 268 Mass., at p. 392.) There are no parties to such proceedings. The petitioners for inquiry act simply in the position of *amici curiae* for the assistance of the court. Inquiry by the court similar in character to the one suggested has been conducted in Wisconsin, in New York, and elsewhere, and the jurisdiction and powers of the courts in such proceedings have been fully sustained by the Supreme Court of Wisconsin in State vs. Circuit Court of Milwaukee County, 193 Wis. 132, 214, N. W. 396 and Rubin vs. State, 194 Wis. 207, and by the opinions of Dowling, P. J. for the unanimous Appellate Division of the Supreme Court of New York and subsequently by the opinion of Chief Judge Cardozo for the unanimous Court of Appeals of New York, the latter opinion being reported in *248 N. Y. 465, 162 N. E. Rep. 487.* A report by Judge Wasservogel, who conducted the New York investigation, is reprinted in the MASSACHUSETTS LAW QUARTERLY for November, 1928, and the report of a similar investigation in Philadelphia, containing a detailed account of conditions there discovered, appears in the Supplement to the MASSACHUSETTS LAW QUARTERLY for November, 1928. A discussion of conditions believed to exist in connection with motor vehicle accident claims in many large cities including the Metropolitan District of Boston, appears in the report of the Special Commission on Motor Vehicle Insurance Law in Massachusetts (Senate 280 of 1930, reprinted in the MASSACHUSETTS LAW QUARTERLY for February, 1930, see pages 73 to 87, 123 to 125, 249, 257).

The disciplinary power of this Court is not merely passive; it does not have to rest inert until some third party calls it into action. It is settled that the Court may act *sua sponte*, and it has the inherent power to grant the relief prayed.

> *Cartwright's Case*, 114 Mass. 230.
> *Boston Bar Association* vs. *Casey*, 211 Mass. 187, 192, 193.
> *Matter of Cohen*, 261 Mass. 484, 486.
> *Matter of Ulmer*, 268 Mass. 373, 392.

The committee of which the petitioners are members, having been organized to investigate the facts and ascertain to what extent the administration of justice in connection with motor vehicle cases is polluted, as is publicly charged, by unprofessional and fraudulent practices by members of the bar and others, needs the co-operation and assistance of the court in the conduct of such

inquiry to the extent of the assignment of a judge, or the appointment of some other officer representing the court with adequate power to conduct judicial hearings promptly in such cases as the investigation shows should be brought to the attention of the court. The mass of suspicious cases, running into thousands, which have been brought to the attention of the petitioners makes it necessary that a representative of the court should be continuously available during the investigation, for the prompt hearing of such cases.

Whether the officer appointed by the court to conduct the hearings when needed shall be described as master, auditor, commissioner, or otherwise, is perhaps immaterial. The disciplinary jurisdiction and supervisory powers of the court over the administration of justice and the practices of officers of the court or other persons which affect it, are in a distinct class apart from the ordinary litigation between parties. The proceedings are summary in their nature and may take such form as the court may direct for its own information. The natural and reasonable course of proceedings would seem to be one similar to a hearing before a master or auditor, with the understanding that the official might apply to the court for interlocutory instructions if needed in the course of the inquiry.

Respectfully submitted,

FREDERICK W. MANSFIELD.

EXTRACT FROM STATEMENT BY MR. MANSFIELD IN THE PRESS AFTER THE FILING OF THE PETITION.

It has been the practice for centuries for laymen to abuse and criticise doctors and lawyers. They have been considered fair game for every one and especially have they been criticised and abused in Massachusetts since the compulsory insurance law took effect. Both professions have been blackened and besmirched. More particularly has the legal profession come in for criticism and charges sometimes made by present and former public officials who are not lawyers and upon vague and indefinite information, gossip and rumor.

This condition of affairs must end. This investigation is a serious endeavor to end it. If the result shows nothing but vague rumor and no proof then the public ought to know it and the lawyer and the doctor ought to be exonerated. If on the other hand the evidence shows guilt then the guilty ought to be adequately pun-

ished and removed from the fields of their professions, and the guilty layman punished if he has committed crime. This is not a reform movement. It is an attempt to eradicate an evil thing if it is found to exist.

The committee ought to get and expects to get whole-hearted and enthusiastic support from every one—press, public and pulpit. Every honest lawyer, if only in self-defence, ought to rally to our aid—every civic organization—every chamber of commerce—every local and metropolitan bar association—every business organization —every church society—every newspaper. There is a job to be done. Now is the time to do it, thoroughly and completely. Let us end the condition if it exists. If it does not exist let us stop talking about it.

PEOPLE EX REL. KARLIN *v.* CULKIN, SHERIFF.

(248 N. Y. 465) 162 N. E. Rep. 487.

Appeal of KARLIN.

Court of Appeals of New York. July 19, 1928.

Petition by the People of the State of New York, on the relation of Alexander Karlin, for a writ of habeas corpus to Charles W. Culkin, as Sheriff of the County of New York, for the release of relator from custody under a commitment for contempt in refusing to testify in an investigation on petition of the Association of the Bar of the City of New York and others. From orders of the Appellate Division (223 App. Div. 822, 228 N. Y. S. 873), affirming an order of the Special Term, dismissing the writ and remanding relator to custody, and an order adjudging him in contempt, he appeals.

CARDOZO, C. J. A petition by three leading bar associations, presented to the Appellate Division for the First Judicial Department in January, 1928, gave notice to the court that evil practices were rife among members of the bar. "Ambulance chasing" was spreading to a demoralizing extent. As a consequence, the poor were oppressed and the ignorant overreached. Retainers, often on extravagant terms, were solicited and paid for. Calendars became congested through litigations maintained without probable cause as weapons of extortion. Wrongdoing by lawyers for claimants was accompanied by other wrongdoing, almost as pernicious, by lawyers for defendants. The helpless and the ignorant were made

to throw their rights away as the result of inadequate settlements or fraudulent releases. No doubt, the vast majority of actions were legitimate, the vast majority of lawyers honest. The bar as a whole felt the sting of the discredit thus put upon its membership by an unscrupulous minority.

It spoke its mind through its associations, the organs of its common will. The court was asked to inquire into the practices charged in the petition, and any other illegal and improper practices, either through an investigation to be conducted by itself, or through some other appropriate procedure. It was asked upon the conclusion of the investigation to deal with the offenders in accordance with law, and to grant such other remedies as would avoid a recurrence of the evil and maintain the honor of the bar.

The court responded promptly. It held (speaking by its presiding justice) that its disciplinary power is not limited to "cases where specific charges are made against a named attorney." It will act of its own motion, whenever it has reasonable cause to believe that there has been professional misconduct, either by one or by a class. Information may be adequate to define the offense and identify the offender. If so, charges will be preferred, and the offender brought to trial. On the other hand, information may be so indefinite as to make charges impossible or improper without further inquisition. If so, the power of inquisition, it was held, is commensurate with the need. "Only by such means will the court be able to devise appropriate rules to prevent the continuance of such evil practices, and bring the unworthy to judgment, and protect the worthy in the profession from suspicions in the public mind."

The order of the Appellate Division designates a justice of the Supreme Court to conduct the investigation at an appointed term, with full authority "to summon witnesses and to compel the giving of testimony and the production of books, papers, and documentary evidence." The petitioning associations are authorized to furnish counsel in aid of the inquiry. The investigation is to extend into the practices described in the petition and any other practices obstructive or harmful to the administration of justice. The court conducting the inquiry is to report the proceedings to the court making the order, i. e., the Appellate Division, with its opinion thereon, and upon the coming in of the report there is to be such other and further action as shall seem just and proper.

The investigation proceeded in the form directed by the order.

Many witnesses were examined. They were given the privilege at their option of examination in camera. There came a time when the appellant, a member of the bar for 25 years, was served with a subpœna. He appeared in court, but refused to be sworn. His practice had involved the trial of many actions for personal injuries. He was called to testify as to his conduct in the procurement of retainers in these cases and in others. There is no denial that the testimony had relation to the ends of the inquiry. His refusal to testify was a challenge to the inquiry as a whole. Upon his persisting in that challenge, the court adjudged him in contempt, and committed him to jail until he should submit to be sworn and examined. A petition for his release upon habeas corpus was dismissed. Both orders, the one adjudging the contempt and the one dismissing the writ, were affirmed by the Appellate Division. They are now before this court.

[1] The precise question to be determined is whether there is power in the Appellate Division to direct a general inquiry into the conduct of its own officers, the members of the bar, and in the course of that inquiry to compel one of those officers to testify as to his acts in his professional relations. The grand jury inquires into crimes with a view to punishment or correction through the sanctions of the criminal law. There are, however, many forms of professional misconduct that do not amount to crimes. Even when they do, disbarment is not punishment within the meaning of the criminal law. Matter of Rouss, 221 N. Y. 81, 85, 116 N. E. 782. Inquisition by the court with a view to the discipline of its officers is more than a superfluous duplication of inquisition by the grand jury with a view to the punishment of criminals. The two fields of action are diverse and independent. True, indeed, it is that disbarment may not be ordered without notice of specific charges. Judiciary Law (Consol. Laws, c. 30) § 476; Matter of Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; Matter of an Attorney, 83 N. Y. 164. So, also, an indictment must precede a conviction of a felony. We cannot know today whether charges will be laid against the relator as an outcome of his testimony or of the testimony of others. If preferred, they will be the subject of a separate proceeding, as separate as proceedings before and after an indictment. The requirements of the law as to the formulation of a charge are inapplicable to an inquisition in advance of the preferment of the charge.

[2, 3] "Membership in the bar is a privilege burdened with conditions." Matter of Rouss, supra, 221 N. Y., page 84, 116 N. E. 783. The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. His co-operation with the court was due, whenever justice would be imperiled if co-operation was withheld. He might be assigned as counsel for the needy, in causes criminal or civil, serving without pay. Code Crim. Proc. § 308; Civil Practice Act, §§ 196, 198. He might be directed by summary order to make restitution to a client of moneys or other property wrongfully withheld. Matter of H., an Attorney, 87 N. Y. 521. He might be censured, suspended, or disbarred for "any conduct prejudicial to the administration of justice." Judiciary Law, § 88, subd. 2. All this is undisputed. We are now asked to hold that, when evil practices are rife to the dishonor of the profession, he may not be compelled by rule or order of the court, whose officer he is, to say what he knows of them, subject to his claim of privilege if the answer will expose him to punishment for crime. Matter of Rouss, supra. Co-operation between court and officer in furtherance of justice is a phrase without reality, if the officer may then be silent in the face of a command to speak. There are precedents of recent date, decisions in Wisconsin and Ohio, upholding the power of the court by a general inquisition to compel disclosure of the truth. Rubin v. State, 194 Wis. 207, 216 N. W. 513; Ohio Ct. of App., 26 Ohio Law Bull. 355, 515. Precedents far more ancient, their roots deeply set in the very nature of a lawyer's function, point the same way.

"The Supreme Court shall have power and control over attorneys and counselors at law." Judiciary Law, § 88, subd. 2. The first Constitution of the state declared a like rule in terms not widely different. Provision was there made that "all attorneys, solicitors, and counselors at law hereafter to be appointed, be appointed by the court, and licensed by the first judge of the court in which they shall respectively plead or practice, and be regulated by the rules and orders of the said courts." Constitution of 1777, § 27. What was meant by this provision that lawyers should be "regulated by the rules and orders of the said courts"? Would the men who framed the Constitution of 1777 have been in doubt for a moment that a rule or order might be made whereby lawyers would be under a duty, when so directed by the court, to give aid by their

testimony in uncovering abuses? We find the answer to these questions when we view the history of the profession in its home across the seas.

The barrister, unlike the attorney, was not in the strict sense an officer of the court where he was privileged to speak. Halsbury, Laws of England, vol. 2, p. 385, title "Barristers"; Wettenhall v. Wakefield (1833) 2 Dowl. 759. He was called to the bar upon the nomination of the inns of court, whose members exercised that power as the delegates of the judges. King v. Benchers of Gray's Inn, 1780, 1 Douglas, 353, per Mansfield, L. C. J.; King v. Benchers of Lincoln's Inn, 4 B. & C. 855; 2 Holdsworth, History Laws of England, 496; 6 Holdsworth, History Laws of England, 434; Pearce, Inns of Court (2d Ed.) 405, 415; Halsbury, supra, vol. 2, p. 360. If a barrister was suspected of misconduct, the benchers of his inn might inquire of his behavior. We can hardly doubt that refusal to answer would have been followed by expulsion. There was thus little occasion for controversies as to discipline to be brought before the judges, unless the benchers failed in the performance of their duties. In case they did fail, a supervisory power was ever in reserve. The inns, being unincorporated associations, were not subject to mandamus. King v. Benchers of Gray's Inn, 1 Douglas, 353; King v. Benchers of Lincoln's Inn, 4 B. & C. 855; Pearce, Inns of Court, supra. They were subject, however, to visitation by the judges. King v. Benchers, etc., supra; Pearce, supra. What the court could not do by the instrument of a writ, the judges did by orders in their capacity as visitors. They were not diffident or chary in announcing their pleasure or displeasure. Dugdale's Origines Juridiciales contains a record of the orders of the judges in the exercise of their control over members of the inns. The conduct of the barristers was regulated with minute particularity, even in matters so personal as the growth of their beards or the cut of their dress. See, e. g., 4 Holdsworth, History of English Law, 264; 6 Holdsworth, 434; Dugdale, supra, pp. 191, 310, 311, 314; 1 Cunningham, Historical Memorials, 208-240; 2 Black Books of Lincoln's Inn, 20, 21, 30, 31, 32, 47, 132, 275, 392, 393, 410, 432, 440, 451, 454; 3 Black Books, 445; Pension Book of Gray's Inn, pp. 61, 91, 102, 120, 169, 212, 279, 290, 295, 337; 2 Middle Temple Record, 986, 987; 3 Inner Temple Records, 30. Short shrift would there have been for the barrister who refused to make answer as to his professional behavior in defiance of the visitors.

The attorney, unlike the barrister, was not a member of an inn, but an officer of the court, and subject to its orders. 6 Holdsworth, 434. These orders might be general, not directed to a single attorney as the outcome of a controversy, but announcing rules of conduct to be adhered to in the future. Many prohibitions now imbedded in our law, often with the added sanction of a legislative enactment, came into being through regulations or orders adopted by the court of its own motion to put an end to some abuse. Thus, by section I of an order made in Michaelmas Term, 1654, by the Court of Common Pleas, as well as by a like order of the Court of Upper or King's Bench, attorneys were required to give notice of their chambers of habitations "under pain of being put off the roll"; no one, under like penalty, was to practice in another's name, nor was any one knowingly to permit another to practice in his name, excepting in warrants of attorney for common recoveries; "for the prevention of maintenance and brocage, no attorney was to be lessee in an ejectment nor bail for a defendant in this court in any action." Cooke's Rules, Orders and Notices of the Courts of Common Pleas and King's Bench, Michaelmas Term, 1654.

The plenitude of the control thus asserted over the behavior of attorneys would lead us to infer that there was power to compel them to submit to an inquisition as to professional misconduct, even if precedent more precise were lacking for such an exercise of power. The curious thing is, however, that precedents more precise exist. More than three centuries ago evils not unlike those revealed in this petition disturbed the English courts. They met the situation in much the same way, by an inquest under oath as to the conduct of their officers.

In Easter Term, 9 Eliz. 1567, the Lord Chief Justice of the Common Pleas delivered a charge to a jury made up of officers, clerks and attorneys, who had been summoned by special writ to inquire into wrongdoing by officers of the court. Cooke's Rules and Orders in the Common Pleas. This was not a grand jury in the usual sense, for the Common Pleas was not a court of criminal jurisdiction. The ordinary courts of criminal jurisdiction were the King's or Queen's Bench and the Courts of the Justices of Assize, Oyer and Terminer and Gaol Delivery. Stephen, History of the Criminal Law, vol. 1, p. 75; Jenks, Short History of English Courts, pp. 170-174; Holdsworth's History of English Law, vol. 1, pp. 198, 212; Coke, 4 Institutes, 99. The special jury was instructed to inquire into falsities, erasures, contempts and misprisions, "de omni-

bus falsitatibus, de rasuris, de contemptibus, et de misprisionibus." Those guilty of falsities were the ambulance chasers of the day. A falsity, said the Lord Chief Justice, is "where a man outwardly will set a shew, a face and countenance that he doth well, and truly knowing inwardly and to himself that it is not so, but mere subtlety and falsehood, as, for example, if he will sue forth of purpose false process, or wittingly of himself will minister a false and foreign plea, not taking it of his client." An erasure, as its name imports, is a wrongful alteration of a record of the court. A contempt is committed by "such as contemn and break our orders and rules, and will not obey the orders of this court; within this are not only officers, clerks and attorneys contained, but also any other stranger that contemneth the same." A misprision "is where a man knoweth treason or felony to be done, and yet doth conceal it and keep it close."

This might seem, if it had been left unqualified, to be a license to inquire into misprisions generally. A qualification swiftly followed. "The misprision you are to inquire of is misprisio clerici," as where writs have been fraudulently put in without the seals required by law. The offense was thus linked to the jurisdiction of the court. The charge closes with an arraignment of disloyal or negligent attorneys, and an appeal to the jury to hold them to their duty. Our court is "slandered and evil spoken of, our cares and labors made void and frustrate" by the "negligence of clerks and ministers;" the client "beginneth to think evil of us that are judges, to suspect our skill," and to speak evil of the law. "Of these and like negligences" the jury shall inquire; and also of such attorneys "as be late and slack comers to the term by reason whereof their clients' matters go not forward." "We shall deprive such of their attorneyship." The end of the inquisition was, not punishment, but discipline. "I will appoint you no time certain," said the Lord Chief Justice in conclusion, "but that you may do it at your leisure in time convenient between this and Michaelmas Term; if you will have such as give evidence to be sworn, we shall find the means that they shall be sworn." The inquest was not to lack the sanction of an oath.

In Michaelmas Term, 1654, both the Common Pleas and the King's Bench resorted to a like expedient for the discipline of attorneys as well as other officers. Cooke's Rules, Orders and Notices in the Court of Common Pleas and in the Court of King's Bench.

The order of the Common Pleas is divided into sections. Section III bears the title "concerning the reformation and punishment of abuses in general." It is—

> "ordered that a jury of able and credible officers, clerks and attorneys once in three years be impaneled and sworn to inquire:
>
> "1. Of the points usually inquirable by the writ, viz., falsities, contempts, misprisions and offences.
>
> "2. Of such who have been admitted attorneys or clerks and are notoriously unfit, their names to be presented to the court, and they to be punished or removed, as the case shall require.
>
> "3. Of new or exacted fees, and of those that have taken them under whatsoever pretense, and to prepare and present a table of the due and just fees that the same may be fixed and continue in every office, and likewise for the Fleet.
>
> "And that some persons be enjoined and sworn to give evidence, viz., some clerks of the court, and some attorneys in every county, not excluding others."

A system was thus established for a continuing inquiry into the conduct of attorneys, with a view to their discipline and removal by a court of civil jurisdiction.

Supplementary to this system are the provisions of section IV, "concerning the better preservation of order among the officers and clerks, and observation of breach of orders and misdemeanors." By this section it was ordered "that the court do once every year in Michaelmas Term nominate twelve or more able and credible practisers in the court to continue for the year coming for these purposes hereafter limited"; that "they give information to the court from time to time of breaches of orders and miscarriages of officers, attorneys and clerks." Cooke's Rules, Orders and Notices of the Court of Common Pleas.

Orders similar to those set forth in sections III and IV were made at the same term by the Court of Upper or King's Bench.

With this background of precedent there is little room for doubt as to the scope and effect of the provision in the Constitution of 1777 that attorneys might be regulated by rules and orders of the courts. The provision was declaratory of a jurisdiction that would have been implied, if not expressed. The next Constitution, that of 1821, was silent as to the whole subject, containing no reference either to regulation or to appointment. Promptly, to avoid misapprehension, the Legislature passed a statute, the Act of April 17,

1823 (Laws 1823, c. 182, § 19), which continued in the same words the provision formerly contained in the Constitution of 1777. There was a revision of the statutes in 1827 (Act Dec. 4, 1827), in which the provision was omitted, but the courts continued to act upon the theory that the power of regulation was either inherent or implied. Matter of H., an Attorney, 87 N. Y. 521. The question does not now concern us whether the power may be withdrawn or modified by statute. Matter of Cooper, 22 N. Y. 67, 68. Instead of being withdrawn, it has been explicitly confirmed. In 1912, by an amendment of section 88 of the Judiciary Law (Laws 1912, c. 253), the jurisdiction was removed from the realm of implication. The earlier statutes were restored through a renewed declaration that lawyers are subject to the control and power of the court. We are back to the law as it existed in 1777.

[4] The argument from history is reinforced by others from analogy and policy. The power of the court in the discipline of its officers is in truth a dual one. It prefers the charges, and determines them. Matter of Percy, 36 N. Y. 651; Randall v. Brigham, 7 Wall. 523, 540, 19 L. Ed. 285; Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552; Fairfield County Bar v. Taylor, 60 Conn. 11, 22 A. 441, 13 L. R. A. 767; Matter of Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539. Preliminary inquiry there must be, at least to some extent, before a decision can be reached whether to prosecute at all. Matter of Percy, supra. Voluntary affidavits or even unsworn statements will often be enough. Matter of Percy, supra; Randall v. Brigham, supra. Occasions may arise where the probe must be more searching if justice is not to fail. The power to inquire imports by fair construction the power to inquire by methods appropriate and adequate, and so by compulsory process if search would otherwise be thwarted. Analogies are at hand to give support to that conclusion. A legislative body may act upon common knowledge or information voluntarily contributed. At times it stands in need of more. There is then power to investigate by subpœna under the sanction of an oath. Briggs v. Mackellar, 2 Abb. Prac. 30; People ex rel. McDonald v. Keeler, 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 49; McGrain v. Daugherty, 273 U. S. 135, 175, 47 S. Ct. 319, 71 L. Ed. 580, 50 A. L. R. 1; Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harvard L. Rev. 153, 167. "The right to pass laws necessarily implies the right to obtain information upon any matter which may become the subject of a law." Briggs v. Mackellar, supra. Cf.

General City Law (Consol. Laws, c. 21) § 20, subd. 21. Such analogies are not decisive, yet they reinforce in some degree the structure of the argument. A curious anomaly would be here, if the courts with all their writs and processes could do less in regulating and controlling the conduct of their officers than a legislative body can do in relation to a stranger.

[5] The argument is pressed that, in conceding to the court a power of inquisition, we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. The mere summons to appear at such a hearing and make report as to one's conduct may become a slur and a reproach. Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages. This has been done in the First judicial department, at least in many instances, by the order of the justice presiding at the hearing. It has been done in the Second judicial department, where a like investigation is in progress (Matter of Brooklyn Bar Ass'n, 223 App. Div. 149, 227 N. Y. S. 666), by order of the Appellate Division directing the inquiry.

[6] A preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right, is not a sitting of a court within the fair intendment of section 4 of the Judiciary Law, whereby sittings of a court are required to be public. It is a quasi administrative remedy whereby the court is given information that may move it to other acts thereafter. Cf. Matter of Richardson, 247 N. Y. 401, at pages 413, 418, 160 N. E. 655. The closest analogue is an inquisition by the grand jury for the discovery of crime. There secrecy of counsel is enjoined upon the jurors by an oath of ancient lineage. Sir Frederick Pollock, Essays in the Law, p. 212. It would be strange if disclosure were a duty upon an inquisition by the court. There is a practice of distant origin by which disciplinary proceedings, unless issuing in a judgment adverse to the attorney, are recorded as anonymous. See, e. g., Matter of an Attorney, 83 N. Y. 164; Matter of H., an Attorney, 87 N. Y. 521. The need of secrecy is the greater when the proceeding is in the stage of preliminary investigation. Full protection against publicity was accorded to the relator, if he had chosen to avail of it. Publicity came to him through his refusal to be sworn.

[7] We conclude that the refusal was a contempt (Civil Prac-

tice Act, § 406), and that the investigation must proceed. In so holding we place power and responsibility where in reason they should be. No doubt the power can be abused, but that is true of power generally. In discharging a function so responsible and delicate, the courts will refrain, we may be sure, from a surveillance of the profession that would be merely odious or arbitrary. They will act considerately and cautiously, mindful at all times of the dignity of the bar and of the resentment certain to be engendered by any tyrannous intervention. No lack of caution or consideration can be imputed to them here. They did not move of their own prompting, but at the instance of the very bar whose privacy and privilege they are said to have infringed. In the long run the power now conceded will make for the health and honor of the profession and for the protection of the public. If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.

The orders are affirmed.

POUND, CRANE, ANDREWS, LEHMAN, KELLOGG, AND O'BRIEN, JJ., concur.

Orders affirmed.

A similar investigation in Brooklyn was ordered by the Appellate Division of the Supreme Court in the Second Department, on petition of the Brooklyn and the Queens County Bar Associations. The unanimous opinion delivered by Lazansky, P. J., (*223 N. Y. App. Div. 149 at p. 153*) contained the following passage:

> "Although the court will assert its power to make a vigorous and effective investigation of the alleged wrongdoing, it must, at the same time, be careful to guard the good name of the innocent. A summons to attend a hearing, publicly advertised, might mean to those who are quick to condemn that the person summoned is involved in these corrupt practices, though he be entirely blameless. Furthermore, it is an investigation of a condition, and not of the acts of any designated person. Therefore, no one is entitled to a hearing. For these reasons, it has been determined that the inquiry shall not be conducted in public *until the coming in of a report, after which such further steps will be taken as may be deemed appropriate and necessary.* A justice of the Supreme Court will be designated to sit at a Special Term to conduct the investigation."

NOTE.

The order of the Supreme Judicial Court directing the inquiry, already referred to, recognizes this need of protecting individuals from premature and unfair publicity.

THE PROSPECTS OF LEGISLATIVE PROPOSALS RELATIVE TO THE ACTIVITIES, ADVERTISEMENTS AND SOLICITATION BY BANKS AND TRUST COMPANIES IN REGARD TO FIDUCIARY RESPONSIBILITIES.

This subject has been discussed repeatedly by various members of the bar from different points of view in recent numbers of the QUARTERLY and of the *Bar Bulletin* of the Bar Association of the City of Boston.

At the last session of the legislature, two bills were introduced, one by the Hampden County Bar Association (House Bill 499), dealing with legal activities of corporations, but not with their solicitation of fiduciary positions; and the other by Paul A. Dever, Esq., (House Bill 175 now reintroduced as House 194 of 1932), containing the drastic proposal that,

> "Any person, corporation or association who, in a book, pamphlet, circular, advertisement or advertising sign or otherwise in writing represents that it is competent or authorized to act as administrator, executor or trustee, shall be punished by a fine of not more than five thousand dollars".

These bills were printed in the MASSACHUSETTS LAW QUARTERLY for January, 1931, pages 43–45, and the discussion of the subject at the annual meeting of the association in December, 1930, was printed on pages 12–29.

Thereafter, a third bill, House 1579, was reported by the Committee on Legal Affairs. Later, a fourth bill, House 1624, was substituted for House 1579 and passed the House by a vote of 79 to 62. In the Senate, after minor amendments, House 1624 was refused a third reading by a vote of 21–13. For convenience in reference and comparison, House Bill 1624 (which is reintroduced this year as House 192 and 193 of 1932), with extracts from the legislative Journals in regard to it, are printed at the end of this discussion.

The Committee of the Hampden County Bar Association expects to introduce another bill at the coming session relating to the subject. Accordingly, a legislative discussion may be anticipated. We have been requested from time to time by various persons to suggest a draft of legislation embodying some of the views

which have been expressed from time to time in these pages, in order that such draft might be considered.

As a member of the Executive Committee of the Massachusetts Bar Association in 1925, the writer joined in the vote favoring a statute

> "prohibiting any person or corporation from advertising or soliciting their own employment or appointment as executor, administrator, trustee, guardian or conservator by other means than a mere statement that they are authorized to act as such".

We have never been convinced that the judgment of the ten members of the Executive Committee who took part in and supported that vote in 1925 (See MASSACHUSETTS LAW QUARTERLY for February, 1925, page 35) was not sound. On the contrary, our judgment is still that it would be not only for the interest of the community, of the beneficiaries of trusts and the families of the Commonwealth, but also in the long run very much the best thing for the banks and trust companies themselves if such a legislative rule were adopted. We think there is a growing public impression that banks are taking on too many side lines and spreading themselves out too thin, and that this is no more healthy for them in the long run than it is for the federal, state or municipal governments or for individuals.

Without intending to assume the role of a crusader, or attributing any exaggerated importance to his own judgment in the matter, and realizing fully the difficulties about it, the writer submits the following draft of legislation, with an explanatory note, in order that it may focus attention upon what seems to him to be the central problem of the whole matter. Such an act would help to restore the situation contemplated at the time corporate fiduciaries were originally authorized to act by St. 1888, c. 413. We do not believe that at that time any such commercializing of the fiduciary relations as now exists was contemplated. Aside from the elaborate exaggeration and seductiveness of much of the printed advertising, the thing which is criticized, so far as our observation goes, is the employment of representatives to go out and induce people to make their wills or to create trusts, these agents having no interest whatever in the parties solicited and having as their object to get wills or trusts made in which their company is named as the fiduciary. While they may not draw the wills or the trust instruments, they are understood to use such persuasion as they can to have

wills drawn or trusts created and to have their company named as executor or trustee and it is understood that the solicitors' compensation is adjusted in some manner to their success in these respects. These two things, the elaboration of the advertising and the solicitation, seem to be the main causes of the trouble. We do not believe there are any fiduciaries corporate or individual, even the ablest, who are really good enough to justify such advertising, etc.

It has been repeatedly stated in these pages in varying language that this problem must be approached from the point of view of the public interest and not merely from the point of view of lawyers who want business. We repeat the extracts from the *Bar Bulletin* which were printed in the QUARTERLY for August, 1931, page 23,

> "The lawyer makes a great mistake if he seeks to wipe out the corporate fiduciary. It can not only not be done but it should not be done. The corporate fiduciary obviously supplies a financial need. Growth has not been due entirely to advertising".

The suggestions in this article are made with those statements in mind. We appreciate the fact that many members of the bar, as well as many bankers, may disagree with views which we have expressed about restriction of advertising and solicitation, but practical considerations may gradually change their views on this point. Competent corporate fiduciaries, like competent individuals, can and should rely on reputation for good judgment and management to attract fiduciary business.

We think that legislation of the kind which we suggest may be advisable at this time in the interest of the banks and trust companies because we see no reason to expect that commercially trained advertising departments or solicitors can restrain themselves, or be educated to restrain themselves, into a sounder view of fiduciary relations without the assistance of a simple statute such as we have suggested.

This subject was discussed at length before the Massachusetts Bar Association at the annual meeting in November, 1924.*

As already pointed out, the views thus expressed are those, not of a crusader, but those of an observer. Since this article was written, finding that the bills of last year had been reintroduced, the writer introduced the following:

*MASSACHUSETTS LAW QUARTERLY, for February, 1925, pages 11–39.

DRAFT BILL (House 888 of 1932).

SECTION 1.

Chapter two hundred twenty-one of the General Laws is hereby amended by inserting after section forty-seven the following new section:

> "Section 47A. No corporation or other person or persons shall advertise for their own employment or appointment as executor, administrator, trustee, guardian or conservator by other means than the mere statement that they are authorized to act as such, nor shall they solicit such employment or appointment by agents or otherwise."

SECTION 2.

The last sentence of section forty-six of said chapter is hereby repealed and section three of chapter two hundred fourteen of the General Laws, as amended by chapter one hundred forty-nine of the Acts of nineteen hundred twenty-three and by chapter one hundred twenty-six of the Acts of nineteen hundred and twenty-nine, is hereby amended by adding at the end thereof the following clause:

> (12) Suits to enforce the provisions of sections forty-one, forty-five, forty-six and forty-seven and forty-seven A of chapter two hundred twenty-one. Such a suit shall be commenced only by the attorney general or by leave of court after notice served upon the attorney general by registered mail of the preliminary petition for leave with a copy of such petition and the attorney general may intervene at any stage of the proceedings.*

The foregoing bill was approved by the Executive Committee of the Massachusetts Bar Association at its meeting January 23, 1932.

---

*The sections of chapter 221 referred to are as follows:

Section 41 prohibits unauthorized practice of law by individuals.

Section 45 prohibits filling in of writs, etc., by sheriffs.

Section 46. No corporation shall practice or appear as an attorney for any person other than itself in any court in the commonwealth or before any judicial body or hold itself out to the public or advertise as being entitled to practice law, and no corporation shall draw agreements, or other legal documents not relating to its lawful business, or draw wills, or practice law, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular; provided, that the foregoing shall not prevent any bank or trust company lawfully doing business in the commonwealth from furnishing to persons with whom it may deal or who may apply for the same, through its officers or agents, legal information or legal advice with respect to investments, taxation, or an issue or offering for sale of stocks, bonds, notes or other securities of property, nor shall anything herein prohibit a corporation from employing an attorney in regard to its own affairs or in any litigation to which it is or may be a party. *(Then follows a sentence imposing a criminal penalty the repeal of which is proposed in the draft act above.)*

Section 47 contains certain exemptions or modifications of Section 46.

Section 47A is the new section proposed in the draft act above.

EXPLANATORY NOTE.

This act, like the present section forty-six of chapter two hundred and twenty-one, would seem to apply to national banks because, by *U. S. Code* title, *"Banks and Banking," s. 248(k)*, national banks may be permitted

"when not in contravention of state or local law, etc. . . ." to act as trustee, etc., "or in any other fiduciary capacity in which state banks, etc. . . . are permitted to act under the laws of the state in which the national bank is located".

National banks are subject to the equity jurisdiction of the federal courts which could, it seems, prevent their violating state laws.

The provision that the law shall be enforced at the suit of the attorney general or by leave of court follows to some extent the provision in chapter 126 of 1929. This seems better than to impose or limit the proceedings to bar associations or members of the bar as was proposed in one of the bills before the legislature at the last session. It is also better that this subject should be added to the section of chapter two hundred fourteen relative to equity jurisdiction of both the higher courts. Criminal proceedings are futile in practice for such purposes.

With the changes above proposed, no special occasion appears for redrafting sections 46 and 47 of chapter 221. The fewer changes suggested in the statutes, the better. The present law seems broad in regard to holding out, etc.

The provision in section 1 of the draft limiting advertisement and solicitation of fiduciary positions to a statement of authority to act follows the vote of the Executive Committee of the Massachusetts Bar Association in 1925 which was based on the suggestion of the late William R. Sears in his letter, printed in the MASSACHUSETTS LAW QUARTERLY for February, 1925, pages 36–38.

This provision puts this sort of advertisement upon a similar basis with the publication of a "simple business card", referred to in the third sentence of the 28th canon of the Massachusetts Canons of Ethics and the 27th canon of the American Bar Association in regard to advertising, etc.

The same reasons against commercializing professional relations which are especially fiduciary in character seem to apply to commercializing such fiduciary relations by lay organizations, although the acceptance and administration of such fiduciary posi-

tions does not constitute practising law as the bar has not, and should not have, a monopoly of such positions.

The question has been asked, "What is the meaning of the words 'advertising' and 'soliciting' as restricted in the proposed statute?"

It is to be noticed in the first place that it is not proposed as a criminal statute, but as a civil regulation of a practical business problem. As such, we believe it to be capable of a commonsense interpretation with less difficulty than arises in the application of many statutes.

There is nothing in the proposed language which would prevent a bank from advertising its general soundness *as a bank* with a condensed statement of its condition and a list of its board of directors and other officers by way of illustrating its soundness as a competently managed institution. The sort of solicitous advertising which would, and in our opinion should, be stopped by the statute and by the courts is the active stimulation by literature, which is considered educational, of the making of trusts in the hope, doubtless often realized, that the institution issuing such educational pamphlets will be selected as the fiduciary by the person thus seduced into the creation of a trust.

The difference between the creation of trusts and other business arrangements involving property management, such as agencies, is that in the case of a trust the trustee takes over the title to the property and neither the donor nor the family for whom he provides can get rid of the trust or of the particular trustee except by difficult, expensive and uncertain legal proceedings and, except under very unusual circumstances, only in case of flagrant mismanagement.

The person who owns property has the right to create such trusts of such property as he sees fit, but the policy of the law which recognizes this right is quite different from a policy of allowing organized business concerns to indulge in the active encouragement and solicitation of the creation of such trusts. Wholesale commercial stimulation and solicitation of the creation of such trusts seems unhealthy for the community in the long run because the creation of a trust often means the practical control of a family through control of its finances. What is going on therefore is a campaign for commercial reasons to induce people to place their families, to a considerable extent, in the control of corporate fiduciaries.

We do not believe that it is healthy to encourage men and women to tie up their families in trusts by the seductive art of educational pamphlets prepared by persons who know nothing about the family conditions or the individuals to be affected. It may often be bad for a family to create a trust. It should be left to the voluntary action of the individual property owner, who should have a right to die intestate if he wants to without being urged to make a will or a trust by some business concern that wishes to be his business executor or trustee. Probably many unwise trusts are created by people who would not create them if it were not for solicitation. Doubtless some such unwise trusts have been created on the advice of individual lawyers, but individuals are not in a position today to indulge in wholesale stimulation of them.

As to the proposals in House 1624 of last year and House 192 and 193 of this year, now pending before the legislature, these bills are attempts at a partial definition of the practice of law and we doubt their advisability. The present statutes and the case law are quite broad as far as the activities of corporations and individuals are concerned, and we believe that the matter can be dealt with by the courts under the civil proceedings, which are suggested in the bill above printed, better than by any statutory definition. In this connection, we notice that the report of a committee of the California State Bar, which has devoted a considerable amount of study to this subject, recommended "that no attempt be made to induce the legislature to define the practice of law" by statute and this recommendation was approved by the State Bar at its annual meeting last October. (See Proceedings of fourth annual meeting, State Bar of California, pp. 259 and 147–149.)

The Executive Committee of the Massachusetts Bar Association, however, at its meeting on January 23, 1932, did not agree with this view and by a vote of 11 to 1 (the writer voting "No") approved House Bill 192 of the Hampden County Bar Committee.

In making equity jurisdiction applicable to sections 46 and 47 in place of the criminal penalty of section 46, equity jurisdiction should also be made applicable to section 41 so that section may be enforced by injunction.

If that is done, is there any reason for also cutting out the criminal penalty in section 41?

If it is a mistake to have both methods of enforcement open under section 41, then equity jurisdiction is a far better and more effective method of enforcing section 41 than a criminal proceeding.

Section 41 is largely a dead-letter today because it is enforceable only by criminal proceedings.

The whole business of illegal practice by notaries, etc., could be handled more effectively by the bar by the proposed equity proceedings, whereas today it must be handled through the district attorney with all the difficulties of criminal proof, etc. A man from Fall River at the legislative hearing last year spoke emphatically of the need of putting some of these "notary" lawyers out of business in order to protect the public (cf. MASSACHUSETTS LAW QUARTERLY for January, 1930, page 49).

We see no reason why both methods of enforcement should not be applied under section 41, but it would be a mistake to apply anything but equity jurisdiction under section 46.

It has been suggested that the simplest and most direct method of enforcing a restriction on solicitation would be a statutory provision that the court upon objection of any person interested might in its discretion refuse to appoint a fiduciary who had solicited the position or the making of the will by which the trust was created. Such a provision might, of course, be inserted although such discretionary power might exist under the statute above suggested without a specific provision to that effect. Possibly it exists today on the ground that soliciting if sufficiently flagrant may show lack of "suitability".

Attention is also called to the serious discussion by Professor George K. Gardner printed in the MASSACHUSETTS LAW QUARTERLY for August, 1931, pages 24 to 27, of the extent to which the corporate structure is adaptable to fiduciary responsibilities of the kind which are now being rapidly multiplied. Professor Gardner suggests legislation that no corporation should be appointed as sole trustee. As a matter of policy for the individual creating the trust, either by will or *inter vivos*, I think the plan for an individual co-trustee is a sound one in general, but I am in doubt as to the advisability of legislation such as Professor Gardner suggests containing the drastic requirement of appointment of an individual co-trustee in every case.

F. W. GRINNELL.

THE HAMPDEN COUNTY BAR BILL.

House bill 1624 of 1930 referred to in the above discussion has now been reintroduced by the Hampden County Bar Committee as House 192 of 1932 and by Mr. Dever as House 193, as follows:

HOUSE, No. 1624 of 1931 *(now reintroduced as House 192 and 193 of 1932)*

The proposed changes in the present law are in italics.

Substituted, on motion of Mr. Derham of Uxbridge, for House bill No. 1579, amended. May 12, 1931.

An Act relating to the Unauthorized Practice of Law and prohibiting Certain Acts and Practices.

Be it enacted, etc.:

SECTION 1. Chapter two hundred and twenty-one of the General Laws is hereby amended by striking out section forty-six and inserting in place thereof the following:—

Section 46. It shall be unlawful for any individual or association of individuals, except members of the bar of this commonwealth admitted and licensed to practice as attorneys at law, to appear as attorney or counsellor at law in any action or proceeding in any court in this commonwealth or before any judicial body or the industrial accident board or the board of tax appeals, except that a member of the bar in good standing of any other state may so appear by consent of the tribunal before which such individual seeks to appear; or to maintain, conduct, or defend the same, except in his own behalf as a party thereto or, by word, sign, letter or advertisement, to hold out himself, or themselves as competent or qualified to give legal advice or counsel, or to prepare legal documents or as being engaged in advising or counselling in law or acting as attorney or counsellor at law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any individual or association of individuals except members of the bar, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare directly or through another for another individual, firm or corporation, any will or testamentary disposition, or instrument of trust serving purposes similar to those of a will, or, for a fee or any consideration, to organize corporations or prepare for another individual, firm or corporation, any other legal document.

It shall be unlawful for any corporation to practice or appear as an attorney for any person other than itself in any court in the commonwealth, or before any judicial body *or the industrial accident board or the board of tax appeals;* or hold itself out to the public or advertise as being entitled to practice law, and no corporation shall *organize corporations* or draw agreements, or other legal

documents not relating to its lawful business, or draw wills, or practice law, *or give legal advice,* or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular; provided, that the foregoing shall not prevent a corporation from employing an attorney in regard to its own affairs or in any litigation to which it is or may be a party; and provided further that the foregoing shall not prevent any bank or trust company or corporation lawfully doing business in the commonwealth from furnishing to persons with whom it may deal or who may apply for the same, through its officers or agents, legal information or legal advice with respect to investments, taxation, *stocks, bonds, notes or other securities or property directly incident to the business for which it has been chartered or incorporated or for which specific legal authority has been granted; and provided further that the foregoing shall not prevent a person from appearing before the industrial accident board in behalf of any injured person.*

The superior court shall have jurisdiction in equity upon application of any bar association within the commonwealth of Massachusetts, or any member of the bar of the commonwealth of Massachusetts admitted and licensed to practice as an attorney at law, to enjoin any person, association of persons, or corporation from violating any provisions of this section.

SECTION 2. Said chapter two hundred and twenty-one, as amended in section forty-seven by section eight of chapter three hundred and forty-six of the acts of nineteen hundred and twenty-five, is hereby further amended by striking out said section forty-seven and inserting in place thereof the following:—

Section 47. The preceding section shall not apply to any public service corporation or to any corporation lawfully engaged in the business of insurance *or suretyship,* or its agents or employees, in carrying on its lawful business or to any person or corporation lawfully engaged in the examination and insuring of titles to real property, or lawfully engaged in assisting attorneys to organize corporations, or organized for and lawfully engaged in benevolent or charitable purposes, or organized under the authority of the commonwealth for the purpose of assisting persons without means in the pursuit of any civil remedy, *or any automobile club or association furnishing the services of an attorney or attorneys to advise or defend its members or prohibit accountants from giving advice, preparing reports, tax returns or other documents necessary or incident to the practice of their profession or prohibit ac-*

countants from appearing before the board of tax appeals or other bodies that so permit by their rules, or prohibit a newspaper from answering inquiries through its columns or any corporation from providing legal advice or assistance to its employees, or a corporation lawfully engaged in the business of conducting a mercantile or collection agency or adjustment bureau from employing an attorney to give legal advice concerning, or to prosecute actions in court relating to, the adjustment or collection of debts and accounts only; *nor shall this section prohibit real estate owners, managers, brokers or agents from drawing agreements, leases, deeds or mortgages relating to real estate over which they have the management or control, or in which they have a property interest or an interest as broker, manager or agent.*

(*Note.* **House 192 of 1932 also repeals §49 which allows appearance by an attorney in fact.)**

In the Senate Journal for May 21, 1931, it appears that

> "The House Bill relating to the unauthorized practice of law and prohibiting certain acts and practices (House, No. 1624, amended),—was read a second time and was amended in section 2, on motion of Mr. Brodbine, by striking out the words 'in the criminal courts in misdemeanors growing out of the use and operation of motor vehicles' (inserted by amendment by the House after the word 'members', in line 21).
>
> "On motion of Mr. Twohig, the bill was amended in section 1, by inserting after the word 'State', in line 13, the words ', or a member of the General Court representing a constituent without fee,'.
>
> "On motion of Mr. Fish, by a vote of 18 to 14, the bill was further amended in section 1, by inserting before the word 'may', in line 13, the words 'or a member of any city council or a member of the board of selectmen of any town,'.
>
> "On motion of Mr. James E. Warren, the bill was further amended in section 1, by striking out, in lines 11 and 37, respectively, the words 'or the Industrial Accident Board'.
>
> "The question on ordering the bill, as amended, to a third reading, was then determined by a call of the yeas and nays," (showing 13 yeas, 21 nays, and 5 absent or not voting).
>
> "So the Senate refused to order the bill, as amended, to a third reading."

All the bills House 192, 193, 194 and 888 of 1932 above referred to are now pending before the Committee on Legal Affairs.

THE NEED OF EGG LEGISLATION IN ENGLAND.

The Minister of Agriculture recently informed the House of Commons that,

> "The term 'new laid' as applied to eggs has not been defined either by statute or reputation."

This statement inspired some genius who assumed the name of "Lucio" to express his views in *"The Manchester Guardian"* as follows:

It is very sad to notice that our indolent M. P.'s
Have never dealt with new-laid eggs when framing their decrees;
Though many forms of fodder come within their careful ken,
Unrespected and neglected is the product of the hen.

There are Acts and regulations which the House of Commons made,
There are codes and reputations as accepted by the trade,
But poor old Humpty-Dumpty as he sits upon his wall,
Well, he hasn't got a statute or a single friend at all.

They certify the sardine and define its where and how,
They regulate the output of the melancholy cow;
There are codes for tea or coffee, or for butter in its keg,
But no one ever regulates the contents of the egg.

It may be new and creamy, or it may be "good in parts,"
But there are no legal schedules with percentages and charts.
But, worst of all (or so it seems to my indignant eyes),
There isn't any standard on the subject of its size.

I find too many eggs about that cannot fill their cup;
They sink in that receptacle instead of sitting up—
I like the egg that looks as though it issued from a hen
Instead of being sponsored by a sparrow or a wren.

So never mind the new-laid egg, for that I can discern,
But pass an Act, with penalties exceeding stiff and stern,
To take the British hen in hand and very plainly tell it
To lay an egg that is an egg and not a feeble pellet.

LUCIO.

HIGH FINANCE IN THE SIXTIES.

CHAPTERS FROM THE EARLY HISTORY OF THE ERIE RAILWAY TOLD BY CONTEMPORARIES.

Edited, with an introduction, by FREDERICK C. HICKS. Yale University Press, 1929.

(From the St. Louis Law Review.)

The title gives an impression that the book should be in the library of the Economics department rather than in the Law School and that the review should be in a journal of Economics. Recalling the interest aroused in his undergraduate courses on railway finance and organization and Ripley's interesting exposition of the struggle for the Erie, the writer looked for a reenjoyment of the dramatic story of forgery, robbery, kidnapping and use of violence and armed force as one looks for relaxation in a detective story. The admirable introduction of Mr. Hicks, outlining the setting and the leading characters in that lively drama in real life, demonstrated, without didactic statement, that this book belongs in the law library and should be read by law students. "An easy public complacency in the presence of sharp practices"; "the supernumeraries included . . . sheriffs, policemen, judges, lawyers, legislators . . ."; "the courts are the weapons of both parties"; "and freight-car loads of rough, hired, proxy-holders vote in the presence of Erie lawyer

David Dudley Field," and the inclusion of the last four selections showed why the book is for a law library. The latter half of the book contains *The Lawyer and His Clients*, by Albert Stickney, *An Inquiry Into the Albany and Susquehanna Railroad Litigations of 1869, and Mr. David Dudley Field's Connection Therewith*, by George Ticknor Curtis, *A Great Lawsuit and a Field Fight*, by Jeremiah S. Black, and *The Truth of a "Great Lawsuit,"* Albert Stickney's reply. Here are live discussions *pro* and *con* on the issue of how far counsel may use legal technicalities and influence with judges to carry out schemes of his client, known to be wrong. Here is the subservient corporation lawyer with his legal trickery and the judge who beggars description who have placed the profession in a light from which it seems impossible to remove it so that public confidence may be restored. That George Ticknor Curtis, (and a) former Attorney-General of the United States and Chief Justice of Pennsylvania should attempt to justify such subservience and practically make the lawyer a mere tool of his employer merely indicates to what extent the prominent members of the bar had yielded to an abstract view of the duties and status of members of the profession. Curtis defended Judge Barnard when the Judiciary Committee of the New York Assembly heard testimony on charges made by the New York Bar Association as a result of which Barnard was later impeached, was found guilty on twenty-five articles, removed from office and disqualified from ever again holding office within the state. Stickney was one of the counsel for the Bar Association, and later served "without charge to the state" as counsel for the impeachment managers. His refutation of the defence of Field is an inspiration to any lawyer to sustain the highest ethics of his profession.

For the general reader, as well as for the lawyer, "The two articles by Charles Francis Adams, and that by Henry, . . . are remarkable for the force of their searching criticism. They are even more remarkable for their courage; for they were written and published, not years afterward, but while the action was in progress, and while all the persons whose honor was impugned were alive and powerful." The setting is appropriate for the modern reader in that it covers the "Gold Conspiracy" and the terrible collapse of the market on "Black Friday" of 1869. It is interesting to note that Henry Adams took his article on the "Gold Conspiracy" to England "for any expression about America in an English review attracted ten times the attention in America that the same article would attract in the *North American*." To his surprise he found the *Edinburgh Review* and the *Quarterly* refused to publish it. "As usual, when an ally was needed, the American was driven into the arms of the radicals," and it was published by the *Westminster Review*, and "it was instantly pirated on a great scale."

And Mr. Hicks has rendered a service in gathering these articles together, with his excellent introduction and choice selection of what turns out to be both of timely interest and distinct benefit to the profession.

CHARLES E. CULLEN.

Washington University School of Law.

SOME INTERESTING "CONFIDENTIAL INFORMATION FOR LAWYERS" (FROM NEVADA).

Turning from the advertizing and solicitation of corporate fiduciaries to similar activities of members of the bar, the editor received, from a member of the association, the following letter:

January 2, 1931.

Editor Massachusetts Law Quarterly:

I received the enclosed circular entitled "Confidential Information for Lawyers" through the mail a short time ago. Notwithstanding the fact that I endeavor to maintain a liberal and reasonable attitude on most matters it occurs to me that this circular is a little bit raw.

Sincerely yours,

NOTE.

The first two pages of the printed circular enclosed appear on the opposite page. The name and address of the attorney and his rather attractive portrait which adorns the first page are omitted. The remaining four pages of the folder contain the "Synopsis of Nevada's Divorce Laws" referred to.

Perhaps other members of the Massachusetts Bar have received similar circulars. If so, perhaps, the Committee on Ethics of the American Bar Association might be interested to know it (cf. Matter of Cohen, 261 Mass. 484).

F. W. G.

Attached to the front of some similar circulars received by other members of the bar from the same Reno lawyer was a small "sticker" as follows:

"Stick Me to the Inside of Your Desk Drawer — You May Have a Divorce Case Any Day"

.....

Attorney-at-Law.

.....Street, Reno, Nevada.

"Allows 33 1/3% to Associates"

Confidential Information for Lawyers

HOW TO OBTAIN A DIVORCE IN NEVADA

PORTRAIT

.....

Attorney-at-Law

..... Street
Reno, Nevada

Member of
State Bar of Nevada
Washoe County Bar Association

Lieutenant-Governor of Nevada for Three Terms
19 to 19

Fellow Attorney:

I have tried to put into this pamphlet all of the things you want to know about how to obtain a decree of divorce in Nevada. As space will not permit the printing of all the laws relative to the subject of divorce, I have made a synopsis of Nevada's Divorce Laws for your information.

The minimum fee in an uncontested case is $150.00. Court costs are extra and amount to $40.00. Maximum fees vary with the amount of work involved and the client's ability to pay.

A good, reasonable fee is $250.00 to $500.00. Fee of attorney to represent defendant by power of attorney varies from $25.00 to $100.00.

In case you have any clients who contemplate divorce, I shall be pleased to have you send them to me. If advised just when they will arrive, I will arrange for their hotel accommodations, and later assist them in finding apartments, if they wish.

In case you send any one, please let me know their circumstances, and how much you believe they would be willing to pay.

A division of *one-third of the fee* will be sent to the corresponding attorney.

Assuring you of my desire to serve you and your clients to the best of my ability, I am

Very truly yours,

.....

A WARNING TO MASSACHUSETTS.

(From the Springfield Union of November 4, 1931.)

The revelations before the Hofstader investigating committee in New York city last week of the manner in which the elective system of filling judgeships lends itself to the gravest abuses should be ample warning to Massachusetts of the danger of departing from the method which obtains in this State.

It was brought out in the New York hearing that a bill originally intended to create five new judgeships in a strongly Democratic district, where the five would have been more than ample, was mysteriously amended to provide for twelve new judges, and it was admitted by Democratic and Republican leaders in the district that a deal was entered into whereby seven of these judgeships would be apportioned to Democrats and five to Republicans. Had there been any understanding or agreement that in all cases the nominations for the judgeships should be made on a basis of fitness, ability and freedom from political entanglements this might not have been so bad, but such was not the case.

The new judgeships were regarded as and, indeed, were intended to be political plums pure and simple. One of the five nominations allotted to the Republicans was taken for himself by the Republican boss who participated in the deal and one of the seven Democratic nominations was handed to the son of the Democratic boss. The others were similarly passed around among political favorites, few if any of whom were the known possessors of any distinguishing qualifications for the bench.

It is needless to ask whether this method of picking judges could be expected to result in the establishment of a capable judiciary as independent of and free from political or other ulterior influences as the essentials of fair and impartial justice requires. The answer too plainly is that it would not. Yet in only a slightly less wholesale manner does the possibility or, indeed, probability of the same political contamination enter into the whole business of popular election of judges.

The elected judge owes his office to politics and political favor and must shape his conduct to retain that favor if he expects to continue in office. There may be exceptions now and then, but they stand out in sharp contrast to the general run of a judiciary chosen in this manner.

We are fortunate that such a system does not prevail in Massachusetts. The judges of the Massachusetts courts, appointed by the Governor and picked for their especial qualifications for the bench, have been with rare exceptions men of high integrity and high standing and long experience in the legal profession, free in every way to discharge their duties conscientiously. This, we have every reason to believe, explains the freedom of Massachusetts judiciary from the scandals which so often have involved the elected judiciary of some other States, and it also explains the high standing of the Massachusetts courts.

From time to time, in fact, at almost every recent session of the Legislature, efforts have been made to bring about a departure from this system but they have been frowned upon by the legislative majority. The airing of the scandal in the New York district should strengthen the opposition in this Commonwealth to any future proposals to throw our courts and judgeships into politics.

EXTRACTS FROM REMARKS OF FREDERICK W. HINRICHS AT THE NEW YORK STATE BAR ASSOCIATION, JANUARY 23, 1932.

(From the New York Herald-Tribune of January 24, 1932.)

Mr. Hinrichs, after being introduced by the retiring president, Frank H. Hiscock, former Chief Judge of the Court of Appeals, began by charging that for years the elective judiciary system in this state had broken down and that judges were in fact appointed "by secret and undisclosed agencies having no official position," and whom he later described as "political leaders of corrupt machines."

> "We all remember how Richard Croker, the Tammany boss, differed with Judge Joseph F. Daly over the appointment of a clerk and Croker's determination to punish him by refusing him a renomination," continued Mr. Hinrichs. "I have seen Croker sitting openly on the Supreme Court bench beside one of his judges for fifteen minutes with an air of proprietorship.
>
> "I am a Democrat, but I have fought for years this practice of these ignorant leaders of corrupt organizations making appointments to the bench. That is what they amount to. Here is Manhattan with a majority of 500,000, where a nomination by Mr. Curry amounts to an appointment, and in Brooklyn, with a Democratic majority of 300,000, a nomination by Mr. McCooey amounts to the same thing.
>
> "We have seen a judge going on the stand and weepingly confess that he spent $20,000 for a nomination for the Court of Common Pleas."

The New York Association thereafter adopted a resolution directing the study of methods of selecting judges. For accounts of the earlier New York elective bench and the demoralization of the bar during "Boss" Tweed's time see Mr. Sheldon's story of the birth of the New York City bar association (MASSACHUSETTS LAW QUARTERLY for August, 1920) and the articles on the Erie scandals reprinted in "High Finance in the Sixties" edited by Frederick C. Hicks (see review on p. 70 above). See also the account of operation of the "elective" system in Cook County, Illinois, in Kale's "Unpopular Government in the United States".

THE WICKERSHAM COMMISSION REPORTS.

(From the Boston Herald of December 14, 1931.)

EXTRACT FROM DR. A. MYERSON'S LETTER.

To the Editor of The Herald:

When the Wickersham committee's report came out, the newspapers throughout the country concentrated their attention on that phase of the report which dealt with prohibition. So far as I know, none of them has sought to enlighten the public on the extraordinary merit of the report so far as the general aspect of crime is concerned.

The volumes published by the government are well worth a place in any man's library, not alone because of their social value, but because they represent a critical, scientific and unbiased approach to the great problem of crime. The literature is fully cited; the conclusions are cautious and without dogmatism; but most important, the report destroys a lot of misconceptions about crime which are current in the community and which form the essence of the bombastic editorials on crime which appear in all the newspapers. The role of politics, poverty and corruption in high places; the role of race, religion, and culture are well taken up, and the results are enlightening enough to demand much more publicity than they ever see.

"THE WISDOM OF THE FATHERS" AS TO THE RELATIONS OF THE STATES.

There's an old story of a successful butter merchant whose son, after being more or less educated in a college, proceeds to correct his father's ideas on many subjects. The father listened amiably. After a good deal of this the conversation one day happening to turn to the butter business, the father made some comments which the son promptly proceeded to dispute, whereupon the somewhat tried parent said, "Oh! *do* let me know *something* about *butter!*"

This story suggests the attitude of complacently, self-sufficient generations towards the ideas of their thinking forefathers, and occasionally current history discloses that while our forefathers may have been wrong about some things, they knew something about "butter"; or in other words the makers of the Federal Constitution

knew something about human nature and its bearing on the future relations of the states, as indicated by the following item from *Commerce and Finance* of December 9, 1931:

LEGISLATIVE FOOLISHNESS.

"There have been and are in many of our states movements to induce people to 'buy at home' to develop one's own town, city or state. The Indiana Legislature has recognized this spirit this year by passing a law compelling all institutions of the state which are supported wholly or in part by public funds to use only Indiana coal, even if, with transportation, it cost as much as 10 per cent more than coal from outside the state. That the purpose of the law is to prevent the importation of coal from Kentucky, Ohio, Illinois and other states is obvious.

"Illinois has joined the procession by coining a slogan, 'Buy only Illinois products!'

"It is evident that in these and other states there exists a sentiment which, but for the prohibition set up in the Federal Constitution, would establish State tariffs against the bringing in of goods from other States. What a network of interstate tariffs would do to the internal trade of the United States can be better imagined than described. The *Evening Post* says:

" 'The whole thing carries us back to the days of the old confederation, when New York taxed products passing its borders, New Jersey and other States did likewise, and the resulting evils were such as to enforce the call of Washington, Hamilton and other statesmen of the time for a better union. The outcome was the Constitution, under which there is free trade among the States. What would its framers have said if they had been told that, after nearly a century and a half of enjoyment of the economic freedom it guaranteed, States would be reverting to the discredited practice of setting up barriers against the products of other States?' "

PLAN FOR DEALING WITH EXPERT TESTIMONY IN LAND TAKINGS.

The need of improvement in the times and methods for the use of expert testimony in connection with judicial proceedings has been pointed out in books, periodicals, addresses and conversation by lawyers and doctors, realtors and laymen, for many years, but very little progress was made until by the so-called Briggs law in Massachusetts, *G. L., chapter 123, s. 100 A adopted by St. 1921, c. 415 and St. 1927, c. 59,* it was provided that all persons charged with homicide should be examined by expert alienists *before* trial

in order that the public trial of *incompetent* persons should be avoided. The practical operation of this act was described by Dr. Overholser, of the State Department of Mental Diseases, in an article in the MASSACHUSETTS LAW QUARTERLY for August, 1928 (See also, QUARTERLY for May, 1931, pp. 26 and 32).

The next step in advance was *St. 1929, c. 380,* the Nichols Act, providing an alternative method of land takings similar to the federal method. This act has not been used much as yet, but experiments with it might well be tried in order to ascertain its advantages and disadvantages, if any, in practice.

The experience under the criminal act above cited has suggested to William Stanley Parker, Esq., a Boston architect, a plan for use in cases in which the Nichols Act is not used. His plan as set out in a bill which he has introduced into the legislature is printed below for the consideration of the bar. The California Statute in regard to experts, referred to by Dr. Overholzer in his article in the QUARTERLY for May, 1931, p. 32, is said to work well.

Mr. Parker's Draft Act.

REGULATING THE USE OF EXPERT TESTIMONY IN CASES INVOLVING THE VALUE OF LAND.

SECTION 1. Chapter two hundred and thirty-three of the General Laws is hereby amended by inserting after section twenty-four the following new section:

> *Section 24A.* In any petition or proceeding involving the determination of the value of real estate or of any interest therein taken by eminent domain or in any proceeding to determine the extent of a betterment assessed upon real estate or any interest therein; whether such petition or proceeding be brought in accordance with chapters seventy-eight, seventy-nine, eighty or eighty A, or in accordance with any special act; neither the commonwealth or any agency or subdivision thereof nor any other party to such petition or proceeding shall be permitted to introduce expert testimony as to the value of the real estate or interest therein affected by the taking or betterment involved in the controversy or as to the extent of the damage thereto or betterment thereof, unless the party seeking to introduce such testimony, within sixty days of the return day of a petition brought in accordance with chapter seventy-nine or within sixty days of the completion of the pleadings in a proceeding brought in accordance with any other chapter or of any special act, shall have filed with the clerk of the court in which such petition or proceeding is pending a statement setting forth in detail the value of such real estate or interest therein and the extent of the damage thereto or bet-

terment thereof, if any, which such party expects to establish. The court upon motion for good cause shown may permit such statement to be filed at any time, but no petition or proceeding shall proceed to trial upon its merits until at least seven days after the filing of such statement. The court, of its own motion or upon motion of any party, may appoint one or more qualified persons to appraise the real estate or interest involved therein in the controversy to estimate the extent of the damage thereto or betterment therof, if any, and to give a report of such appraisal under oath at the trial of the proceeding. At the trial any party shall have an opportunity to cross-examine all persons so appointed and testifying. The court, in any such proceeding tried to a jury, may point out to the jury the fact that a witness appointed by the court is not employed by either party but is an independent appointee of the court.

The reasonable compensation of the experts so appointed by the court shall be determined by the court and the court may order the same to be added to the taxable costs of the proceeding or to be assessed upon the parties to the proceeding in such proportion as the court may determine.

SECTION 2. This act shall apply to proceedings pending when this act becomes effective as well as to proceedings initiated thereafter.

THE REPORT OF THE COMMITTEE ON LEGISLATION OF THE MASSACHUSETTS CONVEYANCERS' ASSOCIATION ON PROPOSED LEGISLATION.

To the Members of the Massachusetts Conveyancers' Association:

It seems desirable to report to the members of the Association the action taken by its Legislative Committee upon certain matters, six in number, which were referred to it by the annual meeting, with full power to draft and present such bills as the Committee might deem expedient. These matters are as follows:

(1) Levies on real estate with special reference to the statute permitting the adjournment of levies.

(2) Suits in equity for the redemption of tax titles before foreclosure proceedings are commenced.

The Committee considered the two matters above mentioned and determined that no legislation was necessary.

(3) Proposed legislation of last year concerning liens on real estate for water, being the subject matter of Senate Bills 119 and 128 of 1931.

Senate Bill No. 119, the important feature of which was a provision that the lien should attach only for water supplied during the two years next prior to the filing of the statement by the City or Town in the Registry of Deeds, was given leave to withdraw.

Senate Bill No. 128, which proposed to amend Section 23 of Chapter 60 of the General Laws by providing that the collector of taxes should include in his written certificate as to taxes and other assessments constituting liens on real estate, a statement as to the amount of rates and charges due for supplying water which, if unpaid, might become a lien, was referred to the next annual session.

The Committee decided to again urge the enactment of these bills in

substantially the same form. Shortly after this decision was reached, it was discovered that R. Ammi Cutter, Esquire, representing the Boston Real Estate Exchange, was working along similar lines. Members of the Committee then took the matter up with Mr. Cutter, with the result that one bill covering both matters has been agreed upon, and filed. This bill departs from Senate No. 128 of last year, in that it requires the Collector to certify as to water charges only in the event that it is his duty to collect water bills, and provides that any other officer or board of a city or town charged with the duty of collecting such bills shall certify thereon in writing, if so requested. This change was made on the suggestion of the Commissioner of Corporations and Taxation. The second part of the new bill is much like Senate No. 119 of last year, except that the period of two years above mentioned is cut down to one year.

(4) Tenancy by the entirety, which was before the legislature of last year in the form of Senate Bill No. 309. (Referred to next annual session.)

A bill has been drafted and filed, which proposes to create a new section (7-A) to be added to Chapter 184 of the General Laws, to provide that no conveyance or transfer of property, real or personal, hereafter made to husband and wife shall create an estate of tenancy by the entirety. The bill also provides that real estate owned by husband and wife as joint tenants and occupied by them, or either of them, in whole or in part as a residence at the time of the death of one shall be exempt from the provisions of the inheritance tax law to the amount in value of $10,000.00, in addition to other existing exemptions.

(5) The right of a mortgagee to pay taxes on the real estate covered by his mortgage and to tack the amount so paid to the mortgage debt.

A bill has been filed, which provides for striking out Section 58 of Chapter 60 of the General Laws, and inserting in place thereof the following:—

"If proceedings have been commenced for the taking or sale of land for a tax assessed thereon, or if such tax or any part thereof remains unpaid upon the date upon which interest thereon begins to run, the holder of a mortgage upon the land may pay such tax, charges and expenses to the Collector; and the amount so paid may be added to the mortgage debt".

(6) Chapter 351 of the Acts of 1928, An Act Penalizing the Misuse of the Proceeds of Construction Loans.

A bill has been drafted and filed, which proposes to add to the Act of 1928 the following:—

", but no person shall be punishable hereunder for the application of a portion of such proceeds to uses other than payment for labor and/or materials if such application is expressly authorized or provided for by the building or construction loan agreement entered into in connection with said mortgage by the parties thereto."

The Committee proposes to keep in touch with the bills which have been filed, and will appreciate any comments by the members of the Association, especially any suggestions which might go to improve the form of the bills.

ALBERT L. PARTRIDGE, *Secretary*,
60 Ames Building, Boston, Mass.

Legislative Committee:

MAYNARD E. S. CLEMONS, ESQ.
FRED L. NORTON, ESQ.
THOMAS F. MCGUIRE, ESQ.
CLARENCE A. BUNKER, ESQ.

January 7, 1931.

AMORTIZATION — AN UNSETTLED QUESTION IN TRUST ACCOUNTING.

While the problem of amortization of bonds bought at a premium and at a discount is of great importance to trustees, the question has received little attention in our decided cases in this Commonwealth. In 1883 Justice Holmes referred to the question as "of very great and growing importance."[1]

As far as bonds bought at a premium are concerned the reason for the absence of decisions on the question becomes apparent to one acquainted with the practice prevalent among trustees and trust accountants. That practice is to amortize or retain out of coupon payments sufficient funds to write off the premiums during the life of the bond. There are in use three methods of amortizing premium bonds, (1) lump sum deduction of the premium paid from the first successive coupons, (2) straight line amortization whereby the premium is written off in equal instalments during the life of the bond and (3) amortization on an accrual basis in accordance with a bond table. While there may be some question as to which method is correct in trust accounting, there exists a unanimity of opinion among trustees despite the absence of express decisions by our court on the subject that premiums must be amortized out of coupon payments. The indication of the decided cases in Massachusetts[2] and the authority of decided cases in other jurisdictions and the approval of our probate judges furnish the reason why the question has not been taken to our Supreme Judicial Court.

The problem of bonds bought at a discount presents a problem which is far more unsettled from a legal standpoint. While the practice among trustees is usually not to amortize the discount on bonds bought below par,[3] this can hardly be taken as an argument for the correctness of the method. Until the question is settled by our courts it is the only safe method for a trustee to follow. By not amortizing discounts the money is kept in the trust and not paid out as income and in case the question is, in the future, decided adversely to the present practice the trustee has merely to pay out as income the money retained by him as principal.

---

[1] *Hemenway* v. *Hemenway*, 134 Mass. 446, 448.

[2] *New England Trust Co.* v. *Eaton*, 140 Mass. 532. See: Henry White Edgerton: *Premiums and Discounts in Trust Accounts*, 31 Harv. L. Rev. 447, 449, 450. See *Annotations*, 4 A. L. R. 1249 and 16 A. L. R. 527.

[3] See: *Trust Companies*, vol. 42, page 513. It may also be pointed out that by the retention of this discount as principal the trustee's fee on the amount so retained is approximately ten times what it would be if it were distributed as income.

While the reason for amortization in trust accounting in the case of bonds bought at a discount is not so obvious as in the case of bonds bought at a premium, it is identical in both cases. In discussing the question of premium bonds courts and authors have often placed their reasoning on the basis of wasting investments.[4] While the analogy of waste is of value it throws no light upon the problem of bonds bought at a discount. The simile moreover represents only a half truth since the investment is wasting only in so far as the original investment is not to be repaid in the last instalment as the so-called "par" of the bond. It is not wasting in that the assets in which the investment has been made have disappeared.

If it can be assumed, and I believe it can, that the only proper bond investment for a trustee is in bonds which will probably pay their coupons and par when due, the problem must be approached from another angle. Probably all lawyers will grant that the life tenant or the person entitled to the income should receive whatever an investment will earn—which in the case of a loan is interest. In the case of a bond the lay mind looks upon the coupon as the interest. But courts have often said that calling something by a name does not of itself make it so. We thus come down to the question of what is interest.

Interest is defined in Bouvier's Law Dictionary as "The compensation which is paid by the borrower of money to the lender for its use, and, generally by a debtor to his creditor in recompense for his detention of the debt."

This definition applies when the creditor is dealing directly with the debtor. The definition is phrased from the standpoint of the debtor. It is, however, the nature of bonds that the creditor may change from day to day. For this reason the interest must be defined from the standpoint of the everchanging creditor or the investor. From this point of view interest may be defined as the compensation which the creditor or investor is to receive according to the terms of the contract for the use of his money.

Thus if the trustee were dealing directly with the borrower the coupon payments would probably represent the interest just as in the ordinary promissory note the interest stated usually represents the rate of profit to the lender. But if commercial paper is rediscounted at a lower rate than that stated on the face of the

[4] A. P. Loring: *A Trustee's Handbook* (Little, Brown, Boston, 1928), page 175; Samuel F. Racine: *Estate Accounts* (The Western Institute of Accountancy, Seattle, Wash., 1921).

instrument due to the addition of endorsements or for other causes no one would maintain that the rediscounting bank gets no interest; and no one would maintain that the interest received by the rediscounting bank is the same as stated on the face of the instrument. Yet the situation is analogous in the case of bonds bought above or below par. The investor and the debtor are not dealing face to face, just as they are not in the case of rediscount. The investor, just as the rediscount bank, may be willing to invest or loan at a higher or lower rate than stated on the face of the paper to be purchased, in this case a bond. In accordance with that willingness he will purchase the bond above or below par.

Thus if an investor will be lured to invest in a given corporate bond only if he will get a 7% annual return on his money and the bonds of that company were floated bearing a 6% coupon, he will be willing to purchase the bond only at a discount.[5] The investment if all payments are met will yield 7%. It is submitted that all of this 7% is income inasmuch as it is what the investment has earned. It is not a capital gain and the present method of trust accounting is not justified in depriving the life tenants or the persons entitled to the income of this increment when earned. When a bond is bought at $900 the persons entitled to the income under the trust instrument and not the remaindermen are entitled to the increment of $100 when $1000 is paid at the maturity of the bond.

It may be pointed out that the only reason that a bond ever sells above par is because more than the par of the bond is to be repaid according to the terms of the contract. This is because of the coupon payments, which when added to the par of the bond always will be found to be more than the purchase price. If a bond bore no coupon payments, it would thus never sell above par but would on the other hand always sell at a discount. Otherwise the investor would be paying the borrower for using his (the investor's) money; or if the investor bought such a bond bearing no coupon payments at par, he would be loaning his money for no additional return or interest.

[5] The placing of interest in terms of percentages per annum is merely a question of mathematics. This mathematics is, however, necessary in order to compare one bond with another, since no two bonds mature at exactly the same time and since bonds vary so much in the "coupon rate" or the amounts of each annual or semi-annual payment. This reduction of the increment to be returned above the original investment (in the case of bonds bought at a premium and at a discount) is necessary since it is the only common denominator upon which bonds of varying maturities and coupon yields can be compared.

The so-called bond tables do this mathematics for the investor—they have no greater significance. See: Justin H. Moore: *Handbook of Financial Mathematics* (Prentice Hall, N. Y., 1929), Chaps. XV-XVII, pages 376, *et seq.*

A purchase of a bond involves the purchase of a contract to be paid certain amounts semi-annually, or in a few cases quarterly, and a certain larger sum at the end of a number of years. All payments are usually secured by the same mortgage or indenture. (Occasionally the mortgage secures the payment of par only). There is no reason for differentiating between the semi-annual payments and the last larger payment. It is arbitrary to say that one is the sole return or interest on the investment and that the last payment alone is repayment of the capital invested. A business man or banker making such an investment or loan is interested only in the profit he will make by the loan.

In so speaking of profits it may be well here to point out a difference in the nature of "profits". Profit is defined as "pecuniary gain, excess of returns over outlay".[6] In this sense we have used the term above. Profit is, however, often used as though it meant only the excess of sale price over cost, and the item interest is not considered a profit. Possibly this singular denotation has come from the bookkeeping practice of not treating interest as a "profit" but as a separate "nominal" or "force" account.

The distinction between capital profits and those made from other sources is well made in Justin H. Moore's *Handbook of Financial Mathematics*. Capital profits are the return above outlay which were not bargained for in the purchase. Thus if an automobile is bought at $100 and later in a different and separate transaction sold to another party for $110, the $10 is a capital gain. But if 100 bags of sugar are bought for $500 for six months future delivery, no capital profit is involved in that transaction alone. But if the price of sugar is believed going up and the contract for future delivery is sold one month later for $600, a capital profit by the sale of the contract itself of $100 is realized. If dollars are to be paid at a future time, instead of bags of sugar there is no distinction and no capital profit is realized if the contract is performed, but is realized only if the contract itself is sold at a higher price. To have a capital profit there must be an increase in value, due to market conditions or otherwise, of the article purchased. In both the above cases the article purchased was a contract for future delivery, in one case of bags of sugar and in the other of dollars. The performance of the contract purchased is not in itself such a capital profit. In one case the purchaser is getting only what he bargained for; in the other he realizes an unforseeable advance in prices. The latter only is capital profit.

[6] *Concise Oxford Dictionary* (Oxford Press, 1929).

It is somewhat surprising that this important item in trust accounting has received so little attention from our courts. Possibly the answer lies in the fact that in many of our modern trust instruments there is a provision giving the trustee discretion to decide what is income and what is principal. But the whole explanation does not lie in this fact alone, inasmuch as there are many wills and trust indentures not having such a provision.

The only decision directly upon this point which has come to my attention is *Re Gartenlaub,* 198 Cal. 204; 244 Pac. 348; 48 A. L. R. 677. In that case the California Supreme Court by a unanimous decision held that a life tenant is not entitled to the discount on bonds purchased below par. Judging from the opinion in that case, it was argued that the yearly income to the life tenant by virtue of a bond bought at a discount should be augmented by an amortization of the discount on an accrual basis, just as conversely the income to a life tenant on a bond bought at a premium is reduced by the yearly amortization of the premium. The court rejected this view and it is submitted was correct in so doing. The court said:

> ". . . yet if the argument presented on behalf of the appellant (the life tenant) is to be given effect, the trustee would be required to withdraw from the *corpus* of said estate the uninvested portion thereof represented in the amount of the discount he has retained in making purchases of bonds at less than par, and pay the same over to the life tenant under the terms of the foregoing trust which require the monthly payment to her of the income, revenue, and profit arising from said estate."[7]

It is submitted that the payment of the discount to the life tenant before the bond is redeemed or sold is paying out as income, interest before it is received by the trustee. It does not follow that because interest cannot be reduced to cash and paid out to the life tenant on an accrual basis, that the increment or discount is not interest. While it may be interest there is no duty on the trustee to pay it out as income until such interest is actually received by the trustee.[8]

The court then said:

> ". . . If it be contended by the appellant that she is not asking the present payment over to her of such discounts but only their accumulation for her benefit, the answer is

[7] *Re Gartenlaub,* 198 Cal. 204, 213.

[8] A contrary solution is given in *Annotation,* 48 A. L. R. 689, 705, with which I disagree for the reasons stated.

> twofold: First, that the right to have such discounts accumulated must rest upon her right to receive the same now or later as 'income, revenue and profits' of said estate, which right as we have seen, does not exist; second, there is no provision in the will of said decedent creating said trust which would empower the trustee to accumulate any portion of the trust properties in any other form than as part of the *corpus* itself."[9]

Such language indicates that the court looked upon discount as something tangible existing from the moment of purchase of a bond below par. This is not so. Thus if in commercial discount a banker is willing to give a borrower $940 for the $1000 promissory note of the latter payable in one year, the $60 increment or discount or interest is not in the banker's possession until the note is paid. In the same manner the discount on a bond has no tangible existence at the date of purchase, it merely expresses what is yet to be paid by the debtor. Thus if a $1000 bond to run X years is bought at $900 the only way to view the transaction is as an investment of $900 and the interest thereon is what the $900 so invested will earn according to the contract so purchased.

It is also interesting to note the testimony of the trust company expert which the court quotes in its opinion and upon which in part the court relies as a basis for its decision. It reads as follows:

> "'In buying bonds for trust estate(s), my company does not ordinarily pay so much attention to the interest yield of the bond as to the safety of the investment. It is our duty to maintain the capital unimpaired as far as we can. Of course I realize that it is the duty of a trustee to secure as high a return on the bonds purchased by it as is compatible with safety, in order that a life tenant entitled to the income of bonds may receive as large a return as a safe and conservative investment will permit. Therefore, as between two bonds which may be considered equally safe for investment purposes, I would prefer the one which yields the higher rate of return if it is a legal investment for trust funds under our Bank Act. The fact that safe bonds are selling at a discount at any time is due very largely to general financial conditions and to the fact that other bonds presumably as safe pay a higher rate of interest on their par value. Other considerations play a part in requiring the sale of a bond at a discount, such as the fact that the company issuing the bond is new, or not well known or established. It is true that in the case of a well known and well

[9] *Re Gartenlaub*, 198 Cal. 204, 214.

established company issuing bonds which are well secured and which constitute safe investments, the main factor which leads to the sale of the bonds at a discount is that the interest return from the bonds is lower than that which can be obtained from other investments presumed to be equally safe. It is true that bonds of the same issue and which are secured by the same security sometimes sell at different times at different prices. Such bonds may sometimes sell at par, again above par and at other times below par. The fluctuation in price of such bonds of the same issue and secured by the same security may be due to the relation which the interest rate of the bonds will bear at different times to the return which may be secured from other investments which are equally safe and numerous other causes and factors. Undoubtedly, the safest bonds are State, County, Municipal, and School District obligations. The rates of interest which they bear are generally less than corporation bonds because of their safety and their income tax exemption.' '' [10]

The court then says:

> ''The effect of the foregoing evidence is to negative the assumption that the controlling factor in determining bond investments by trustees is that of the state of the market as shown by bond and interest tables, and to affirm the right of trustees to invest the *corpus* of their trust estates in bonds which may at the time of the investment be obtainable at a premium or at par or at a discount, regardless of the return in the way of interest or income which is provided for by their terms. If this be true it follows that since the right of the life tenant is measured by the duty of the trustee, the full amount to which the former would be entitled in the way of 'income, revenue, and profit arising from said *corpus*' would be none other than the amount actually provided for as such income, revenue, and profit by the terms of the bond regardless of the price at which it had been acquired. This conclusion becomes all the more inevitable when the legal meaning which has been given to the terms 'income, revenue, and profit' is ascertained. These terms have been held in a uniform line of decisions as not to include increases from any cause in the value of the *corpus* of trust estates; . . .'' [11]

I regret that I have the greatest difficulty in getting any meaning out of this reasoning. As to bond tables, they are only a mathematical aid in expressing in terms of common denominator the return on bonds of varying maturities and coupon yields.[12] It had

[10] *id.*, p. 210.
[11] *id.*, p. 211.
[12] The same statement applies to a bond bought at a premium. See: Justin H. Moore: *Handbook of Financial Mathematics* (Prentice Hall, N. Y., 1929), pages 401, *et seq.*

not been contended that a trustee cannot in his discretion invest in bonds "at a premium or at par or at a discount." I do not understand the sequitur that since the right of the life tenant is measured by the duty of the trustee, the full amount to which the former would be entitled to as income would be none other than the amount actually provided for as income by the terms of the bond. The court further says that increases in the estate belong to the corpus.

While the last proposition is true that in "any accretion to the fund itself . . . as by the rise in value of the securities goes to the remainderman"[13] the real question is whether a discount when earned and paid is in the category of such an accretion to the corpus. Such logic as is used by the court states the conclusion as a reason for its own existence.[14] The cases cited by the court do not discuss this question.

The testimony of the expert quoted by the court reads: "The fact that safe bonds are selling at a discount at any time is due very largely to general financial conditions and to the fact that other bonds presumably as safe pay higher rate of interest on their par value. Other considerations play a part in requiring the sale of a bond at a discount, such as the fact that the company issuing the bond is new, or not well known or established." This reasoning in its general outline is sound; such are factors which go to establish the price of bonds. But it is submitted that given the price of a bond, be it above or below par, all which is to be paid to the investor above his original purchase price, according to the terms of the contract, is interest. This increment when paid is what the original investment of capital earns.

Another point is brought out in the testimony of the trust company expert: "In buying bonds for trust estates, my company does not ordinarily pay so much attention to the interest yield of the bond as to the safety of the investment. It is our duty to maintain the capital unimpaired as far as we can. Of course, I realize it is the duty of a trustee to secure as high a return on bonds purchased by it as is compatible with safety, in order that a life tenant entitled to the income of bonds may receive as large a return as a safe and conservative investment will permit. Therefore, as between two bonds which may be considered equally safe for investment purposes, I would prefer the one which yields the higher rate of return . . ."

---

[13] Perry on Trusts (6th Ed.), sec. 546.

[14] See: Jerome Frank: *Law and the Modern Mind* (Brentano, N. Y., 1930), Chap. VII, "Verbalism and Scholasticism," pages 57, 65.

From the next remarks of the expert, above quoted in full, the bond having the lower rate of return (*i. e.* coupon yield) would sell for less than the bond he would purchase. Since he was free to make choice, he might have chosen the bond with the lower coupon rate or yield, in which event the life tenant would receive less. The assumption is that both bonds are equally safe as investments. They would both be selling on the same net yield basis in the open market, and it is submitted that the return to the life tenant should be the same in both cases, since in most cases the coupon rate on a particular bond depends solely on the chance state of the financial market at the time of the original flotation. Thus debentures of the same company may bear different coupon rates while the security behind the different issues is exactly the same.

It is to be noted that the California Trust Company selected higher coupon yields where possible. This would tend to have smaller "discounts" in the bonds purchased. In this connection it may be pointed out that it is the established policy of at least one of our larger trust companies to always purchase bonds below par so that the principal will show a continued growth. Such a policy would cause the trustee to purchase the bond with the lower coupon yield and the greater discount and therefore the greater ultimate gain in the principal account. Such an accretion to principal is more apparent than real, and is made at the expense of the life tenant. Thus the reasoning of the California court applied to the accounts of this Boston trust company will work a grave injustice to those entitled to the income of the trust whom our court has said it is most often the intention of the testator to protect and benefit in preference to the more remote remaindermen.

In this I have tried to present an interesting question as yet undecided by our courts. Of trust accountants, who are already well acquainted with the problem, I ask indulgence, and hope that they will not find herein only a restatement of views already well expressed by others.[15, 16]

GEORGE K. BLACK.

---

[15] See Article by H. W. Edgerton, 31 Harvard L. Rev. 447. See *Annotations*, 48 A. L. R. 684 and 689. See: Justin H. Moore: *Handbook of Financial Mathematics* (Prentice Hall, N. Y., 1929), Chap. XIV, *et seq.* See: H. A. Feeney: *Principles of Accounting* (Prentice Hall, N. Y., 1927), vol. 2, Chap. 44, "Permanent Investments Bonds and Amortization of Premium and Discount." See: H. L. Rietz & A. R. Crathorne: *Mathematics of Finance* (Henry Holt & Co., N. Y., 1921), Chap. 4, "Valuation of Bonds and Other Securities." See: E. B. Skinner: *Mathematical Theory of Investments* (Boston, 1924), Chap. 10, especially pages 137, *et seq.* See: S. Wallin and H. A. Finley: *Mathematics of Accounting and Finance* (River Press, N. Y., 1921), Chap. XIX, "Bond Discount and Premium". See: R. H. Montgomery: *Accountants' Handbook* (The Ronald Press, N. Y., 1923), pages 158, *et seq.*

[16] If there is any value in this article I wish, without attempting to thrust upon him responsibility for my views, to express appreciation of the assistance in discussion, research and proofreading of my associate, Earle I. Gallin. G. K. B.

THE BILL TO ENLARGE THE FUNCTIONS OF THE CONFERENCE OF SENIOR FEDERAL CIRCUIT JUDGES.

Chief Justice Hughes, in his address to the American Law Institute (quoted in the QUARTERLY for August, 1931, p. 8), stated that the Conference of Federal Judges thought it advisable that the conference should be authorized explicitly to recommend to congress from time to time such changes in statutory law affecting jurisdiction, practice, etc., in the federal courts as may seem desirable.

In accordance with this suggestion, the following bill has been introduced containing an amendment printed in italics.

A copy of the report of the Committee of the Conference of Bar Association Delegates (printed in the QUARTERLY for August, 1931, pp. 7-11) explaining the plan, approved by that Conference, by the American Bar Association and by the Conference of Federal Judges, has been or will be sent by the American Bar Association to the presidents of the various state bar associations, with the suggestion that the plan be carried out. It is a plan of forming committees of the federal bar in the various federal districts for informal cooperation with the Conference of Federal Judges in the study of the federal system. The Conference of Federal Judges was created by congress on the recommendation of Chief Justice Taft about ten years ago. The plan referred to is to adapt to that body the judicial council idea of cooperation by members of the bar—which is especially desirable if the functions of the judicial conference are to be enlarged to include recommendations to congress as provided in the following bill:

72D CONGRESS
1ST SESSION

S. 2466

IN THE SENATE OF THE UNITED STATES

JANUARY 4, 1932

Mr. NORRIS (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Act providing for the annual conference of senior circuit judges.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of

the Act of September 14, 1922 (chap. 306, 42 Stat. 837, 838; U. S. C., title 28, sec. 218), be, and the same is hereby, amended to read as follows:

"SEC. 2. It shall be the duty of the Chief Justice of the United States, or in case of his disability, of one of the other justices of the Supreme Court, in order of their seniority, as soon as may be after the passage of this Act, and annually thereafter, to summon to a conference on the last Monday in September, at Washington, District of Columbia, or at such other time and place in the United States as the Chief Justice, or, in case of his disability, any of said justices in order of their seniority, may designate, the senior circuit judge of each judicial circuit. If any senior circuit judge is unable to attend, the Chief Justice, or in case of his disability, the justice of the Supreme Court calling said conference, may summon any other circuit or district judge in the judicial circuit whose senior circuit judge is unable to attend, that each circuit may be adequately represented at said conference. It shall be the duty of every judge thus summoned to attend said conference, and to remain throughout its proceedings, unless excused by the Chief Justice, and to advise as to the needs of his circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

"The senior district judge of each United States district court, on or before the first day of August in each year, shall prepare and submit to the senior circuit judge of the judicial circuit in which said district is situated, a report setting forth the condition of business in said district court, including the number and character of cases on the docket, the business in arrears, and cases disposed of and such other facts pertinent to the business dispatched and pending as said district judge may deem proper, together with recommendations as to the need of additional judicial assistance for the disposal of business for the year ensuing. Said reports shall be laid before the conference herein provided, by said senior circuit judge, or, in his absence, by the judge representing the circuit at the conference, together with such recommendations as he may deem proper.

"The Chief Justice, or, in his absence, the senior Associate Justice, shall be the presiding officer of the conference. Said conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts

where the state of the docket or condition of business indicates the need therefor, and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business. *The conference shall have authority to recommend to the Congress, from time to time, such changes in statutory law affecting the jurisdiction, practice, evidence, and procedure of and in the several district courts and circuit courts of appeals as may, to the conference, seem desirable.*

"The Attorney General shall, upon request of the Chief Justice, report to said conference on matters relating to the business of the several courts of the United States, with particular reference to causes or proceedings in which the United States may be a party.

"The Chief Justice and each justice or judge summoned and attending said conference shall be allowed his actual expenses of travel and his necessary expenses for subsistence, not to exceed $10 per day, which payments shall be made by the marshal of the Supreme Court of the United States upon the written certificate of the judge incurring such expenses, approved by the Chief Justice."

A GOOD PREFACE TO A BOOK ON A HITHERTO UNWRITTEN SUBJECT, — BOWER'S "JUDICIAL DISCRETION OF TRIAL COURTS".*

PREFACE.

"Surprise is occasioned that there has been no distinct textual discussion of judicial discretion when the innumerable cases giving major consideration to the subject are borne in mind. Further surprise arises at the apparent misconception of the courts themselves as to the meaning of the term and the facility with which they use it to excuse a desired course of appellate action when no other reason readily is at hand.

"Judicial discretion, properly understood and applied, is the discretion of the trial court to adopt either of two inconsistent lines of administrative action where no statue or rule prescribes the exact procedural decision to be made in the circumstances. It is not unfair to note that the principles and logical force of the doctrine often have been nullified by the appellate courts through the substitution of their own discretion for the discretion which properly should reside in the lower court. This attitude of the appellate courts would seem to justify the observation often expressed that it is the higher court and not the trial court which exercises the discretion. This has come about largely by reason of the limitation of the higher court in its study of the case to the printed pages of the record without the opportunity to observe the situation in the

* Published by Bobbs-Merrill Co.

heated atmosphere of a legal contest. The higher court looks back to results rather than forward to possibilities. The inconsistencies of the courts abound in cases where the appellate courts, though basing their decisions upon the asserted premise that a discretionary ruling of the trial court is not subject to review on appeal, yet immediately proceed to review the ruling complained of, thereby nullifying the premise on which the consideration of the question was begun. Other courts, however, do state positively that a discretionary ruling of the trial court will not be reviewed in any case, reasoning that discretion, if it means anything at all, means the right and power of the trial court to make an unrevisable choice between two possible decisions, which choice gives the decision ultimate finality. A long and painstaking examination of the subject makes it safe for me to say that there is no state in the Union where discretionary rulings at some time have not been reviewed, and been made the cause for reversal.

"This is not said in a spirit of criticism, for I am not an advocate of an untrammelled and unreviewable discretion in trial courts, nor, I think, is any one of that great and militant band of trial lawyers who often unsuccessfully and more or less supplicatingly have sought for their clients the favorable discretionary action of the trial court in some matter wherein all demands of reason insisted that they should receive the favor they asked. The better-

The *American Bar Association Journal* for February, 1932, contains an article by Mr. Edward C. Lukens, of the Philadelphia bar, on "Trust Estates and Character". It should be read by every practising lawyer and every corporate fiduciary officer. It explains the unfortunate influence on rising generations of young people, of commercial stimulation by educational advertisements of the indiscriminate creation of trusts. It illustrates the reason for the proposed first section of House 888. No one can say how much individual character, ability, initiative, happiness and freedom to develop may be stifled by an unnecessary, or unwise, trust.

The second section of House 888 was criticized at the hearing on February 11 because it imposed additional burdens on the Attorney General, but that feature of it might well be omitted. The important point is to substitute an equitable for a criminal proceeding.

If House 192 should be adopted, the language of the proposed exemptions in Section 47 should be very closely analysed first. As it is now phrased it seems to throw open the door to a good deal that is not now permitted and thus to defeat largely the purpose of the proposed revision of Section 46.

F. W. G.

heated atmosphere of a legal contest. The higher court looks back to results rather than forward to possibilities. The inconsistencies of the courts abound in cases where the appellate courts, though basing their decisions upon the asserted premise that a discretionary ruling of the trial court is not subject to review on appeal, yet immediately proceed to review the ruling complained of, thereby nullifying the premise on which the consideration of the question was begun. Other courts, however, do state positively that a discretionary ruling of the trial court will not be reviewed in any case, reasoning that discretion, if it means anything at all, means the right and power of the trial court to make an unrevisable choice between two possible decisions, which choice gives the decision ultimate finality. A long and painstaking examination of the subject makes it safe for me to say that there is no state in the Union where discretionary rulings at some time have not been reviewed, and been made the cause for reversal.

"This is not said in a spirit of criticism, for I am not an advocate of an untrammelled and unreviewable discretion in trial courts, nor, I think, is any one of that great and militant band of trial lawyers who often unsuccessfully and more or less supplicatingly have sought for their clients the favorable discretionary action of the trial court in some matter wherein all demands of reason insisted that they should receive the favor they asked. The better-reasoned cases do not assert that a discretionary ruling of a trial court never will be reviewed. The reasonable position has been taken that such a ruling will not be reviewed unless there is an assignment that admitted the matter complained of to have been within the discretion of the trial court but charged that such discretion had been abused, resulting in an injury to the one complaining. No satisfactory definition has ever been put forth of 'abuse of discretion.' But it may safely be said that whenever, upon such a charge, it is shown sufficiently to the equitable perception of the higher court that from the discretionary ruling complained of injustice has been done, or the realization of 'speedy and exact justice' has been prevented, the court should hold that an abuse of discretion has occurred.

"The vast sea of judicial utterance upon the many phases of procedural law falling within the purview of judicial discretion is wholly uncharted as far as any attempt heretofore has been made to arrange an orderly outline of its ramifications into practically every stage of an action in the trial court from the filing of the initial pleading to the ruling on a motion for a new trial. As a result, trial judges and trial attorneys have proceeded without a guide to which they could readily turn in an anxious moment of a trial when some question of judicial discretion suddenly was presented.

"Scattered as the cases have been throughout the whole body of appellate reports, the judge and attorneys must wade through and sift so many sources to find the applicable rule that in most cases the courts do not have the time to reach a satisfactory con-

clusion as to what they ought to do, and are confronted with the necessity of just 'shooting away' and trusting to luck.

"It is the purpose of this volume to serve as a ready guide to quick decisions as to the rules applicable to hundreds of procedural situations that trial judges and trial lawyers must meet in the heat of an intelligent and hard-pressed trial. Though many criminal cases are considered, illustrative of principles generally applicable, the scope of the work is limited, in the main, to civil actions.

"I disavow an attempt, in any measure, to present anything wholly new, or to overturn any established principle. I have sought to be a reporter, passing on to the profession in an orderly arrangement what has been declared to be the law upon the subject by the adjudications of the courts of the country. If it sometimes appears in this volume that certain principles, so obvious as really to need no statement at all, are put forth in such a manner as to indicate to an old hand in the profession that they have been but newly discovered in certain quarters, let it be remembered that a book such as this must be written not only for the lawyers who are seasoned in the bark, but also for those in whom the sap is just rising. R. D. B.

LEXINGTON, KENTUCKY,
September 1, 1931."

COMPENSATION OF MASTERS AND AUDITORS EXEMPT FROM FEDERAL INCOME TAX.

On December 22, 1931, in *Ogden* v. *Commissioner* the Federal Board of Tax Appeals decided that the compensation of an auditor appointed by a state court and paid by the county is not subject to federal income tax. The opinion concludes,

> ". . . petitioner, while engaged in his duties as auditor of the Superior Court, was not an independent contractor in his relation to the Commonwealth of Massachusetts or its subdivisions. *14 R. C. L., 67.* We believe it unnecessary here to decide whether his status is that of an officer or that of an employee of the Commonwealth within the meaning of the statute . . .
>
> "And we think it clear that petitioner, in his official capacity, was an instrumentality or agent of the government, administering or executing governmental functions. His services were judicial in their nature and rendered to the judicial department of the government in the administration of justice. There is no question but that this instrumentality is one through which the state government exercises its sovereign powers; such a necessary function of government as to fall within the established exemption from federal taxation." (See C. C. H. Board of Tax Appeals Service Decision No. 7346—Opinion by Goodrich, "Reviewed by the Board, Lansdon and Smith dissent.")

THE ATTORNEY GENERAL'S SUGGESTION FOR AN AMENDMENT TO THE ANTI-AID AMENDMENT TO THE CONSTITUTION.

In the report of the attorney general for 1931, under the heading, "Observations," appears the following:

> "8. *That section 3 of article XLVI of the Amendments to the Constitution be amended so that payments may be made under the Old Age Assistance Act to institutions privately controlled, caring for persons eligible to receive such pension, as well as to privately controlled institutions caring for the deaf, dumb and blind, now permitted.*
>
> "Aid under the Old Age Assistance Act is furnished to certain people seventy years of age or over who need assistance and who are possessed of certain qualifications. In a number of cases these old people are in privately controlled charitable institutions. They have been in them for a number of years, and due to management and facilities are cared for and supported therein at much less expense to the State or the municipality than elsewhere.
>
> "It has been brought to my attention that municipalities and the Commonwealth doubt legality of payments to such persons because of residence in such homes, and do not aid them lest the payments be deemed *in aid* of the institutions. Consequently, if any of such persons are to be aided, they must move to private homes, with less contentment, and with greater expense to a municipality than there would have been had they been allowed to remain where they were.
>
> "The doubt is occasioned by the operation of section 2 of said article XLVI, which prohibits public money from being expended *in aid of institutions not publicly owned and controlled,* and because the provisions of section 3, while exempting privately controlled hospitals, infirmaries and institutions for the deaf, dumb and blind from the operation of the amendment, do not exempt privately controlled charitable homes caring for and supporting elderly persons entitled to the benefits of the Old Age Assistance Act.
>
> "Removal of this doubt may be effected by a constitutional amendment,[1] extending to private institutions for aged persons the present authorization for expenditures of public moneys to private institutions for the deaf, dumb and blind."

The amendment suggested by the attorney general in the footnote ([1]) is as follows:

[1] "Nothing herein contained shall be construed to prevent the Commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, institutions for the deaf, dumb and blind, *or institutions wherein are persons eligible to receive old age assistance,* not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries *or* institutions to such persons as may be in whole or in part unable to support or care for themselves."

EDITORIAL NOTE.

We respectfully question both the advisability and the necessity of this suggestion. The constitution now provides that,

> "No grant, appropriation or use of public money . . . shall be made or authorized by the commonwealth for any political division thereof for the purpose of founding, maintaining or aiding . . . any college, infirmary, hospital, institution or educational, charitable or religious undertaking which is not publicly owned, etc."

There seems to be nothing in these words to prevent the various municipalities charged with the duty of distributing old age assistance from paying the board or making a contribution toward the board or care of an aged individual, whether that person lives and is cared for in his or her own home or in some other private family or in a boarding house or in a private hospital or charitable institution or from paying doctors' bills. Such payments would not be in "aid" of the institution; they would simply be in "aid" of the individual entitled to such old age assistance. Of course, this does not mean that lump sums could be contributed to a private institution for wholesale service to poor persons.

If the municipalities can pay five dollars a week, or whatever the sum may be, to an individual who takes care of him or to the family who cares for him to cover his board, it can also make similar payments for similar purposes to any private institution for doing the same thing,—in other words, we respectfully submit that the doubts referred to by the attorney general as to the legality of such payments do not exist. So long as such payments are made for the actual assistance or care of or supplies for a specified individual they can not by any reasonable interpretation of the amendment be appropriations in "aid" of the institution. Such payments are payments for service rendered and nothing else. It makes no difference whether they are paid directly to the individual or for the individual. In either case they are in "aid" of the individual and of no one else.

Any one familiar with the history of the anti-aid amendment will, I believe, realize that it would be very unwise to begin to tinker it. The annual controversy in the legislature which finally led to the anti-aid amendment was one of the moving causes for the calling of the constitutional convention of 1917. Those annual controversies have ceased since that amendment was adopted. The subject is better left alone.

F. W. G.

SPECIAL NUMBER

The BAR BULLETIN

No. 53 Issued by the Bar Association of the City of Boston
Editor: Dunbar F. Carpenter, 50 State Street **December 14, 1931**

Presented at the Bench and Bar Dinner, December 14, 1931

Guests { GUY A. THOMPSON, Esq., President of the American Bar Association.
Hon. IRA L. LETTS, Judge of the United States District Court for Rhode Island.

The Courts of Admiralty in New England Prior to the Revolution.

The silver oar which used to adorn the staff of office or "mace" of the Marshal of the Court of Vice-Admiralty in New England has recently come into the possession of the Massachusetts Historical Society. The

The Silver Oar of the Marshall in Admiralty made by Jacob Hurd, Silversmith of Boston about 1750 and said to have been used by Arodi Thayer, Deputy Marshall from July 1762 to 1769 or thereafter. (Arodi Thayer appears to have been appointed on Sept. 30, 1769, "Marshall" or "Sergeant at Mace" of the Court of Appeal at Philadelphia, a court apparently connected with the admiralty. He was a loyalist and with others was banished by Massachusetts by the Act of Oct. 16, 1778. The oar came from the possession of his daughters. See Vice-Admiralty Records in Suffolk Court files.)

Nathaniel Byfield
Judge of Admiralty 1703–1715 and
1728–1733
(From a portrait by Smibert)

Chambers Russell
Judge of Admiralty 1747–1766
Associate Justice Superior Court of
Judicature 1752–1766

admiralty courts figured prominently at times in the Provincial period in Massachusetts and a brief description of them, with portraits of some of the judges may interest the bar.* Washburn's "Judicial History of Massachusetts" gives us some account of them.

The Court of Vice Admiralty.

Under the Colony Charter, by an Act of 1673, admiralty powers were given to the assistants who were authorized to hear and try cases without a jury. Whether any admiralty powers were exercised in the colony prior to that time, we are not certain.

The Province Charter of 1692 reserved to the Crown the power of establishing Courts of Admiralty. About 1694, a court of Vice Admiralty was created consisting of one Judge, a King's Advocate, a Register and a Marshal. The commissions were either under the broad seal, or by warrant from the Lord High Admiral, but were in fact granted by the Lords commissioners of Admiralty in England. The jurisdiction extended to all breaches of the acts of trade, with a single exception, and the forms of proceeding were after the manner of "Doctors Commons" in London. Trials were not by juries, and in the absence of express acts of Parliament, the Civil and Maritime law was adopted as the rule for determining questions. Until 1769, the officers of the court did not receive salaries, but were paid by the fees of their offices. When vacancies existed, the governor exercised the authority of appointing to the place until the vacancy could be supplied by a new appointment by the Lords Commissioners.

The territorial jurisdiction of the Judges of Admiralty varied from time to time according to the extent of their commissions. The colonies were divided into districts, over which the judges were appointed with power of appointing deputies to act under them. At first, the northern district embraced New York, Massachusetts, Connecticut, Rhode Island and New Hampshire. New Jersey was added later. Subsequently, New York and New Jersey were separated and still later the northern district appears to have been restricted to Massachusetts, Rhode Island and New Hampshire (Massachusetts at that time including Maine). It appears to have been common for the judge of this district to appoint a deputy to act for him in Rhode Island.†

The "Justiciary Court of Admiralty."

"Besides the court of Vice Admiralty, already spoken of, there was what Douglas calls a 'Justiciary Court of Admiralty,' which convened as occasion required for the trial of Piracies and other offences upon the high seas.‡ In Massachusetts this court generally consisted of the Governor, the Council, the Judge of Vice Admiralty, the Captain of the

Judge of Admiralty 1728–1733
(From a portrait by Smibert)

Judicature 1752–1766

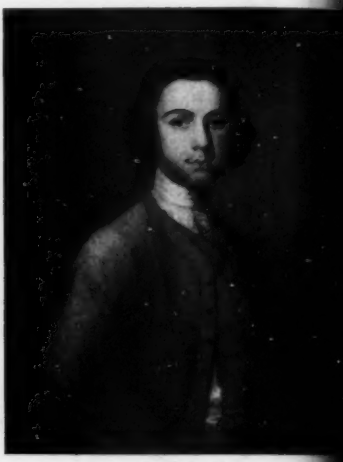
*An account of the English admiralty courts and the controversies with the common law courts over their jurisdiction from the 13th to the 19th century (resembling the controversies with the chancery) appears in Volume II of "Select Essays in English and American Law." In the colonies such prejudice as there was against these courts appears to have arisen mainly from the fact that they sat without juries to apply laws which were at times unpopular, see Davis' "Judicial History," pp. 71–72.

†The various deputies for Rhode Island and otherwise during this period appear to have been Thomas Newton, Nathaniel Byfield, Nathaniel Hubbard, George Cradock, William Reed.

‡Cf. Davis "Judicial History of Massachusetts," p. 11.

King's station ships of war, the Surveyor of customs for the northe district, and the Collector of customs for the Port of Boston. At oth times it was constituted by a special commission for the purpose. 1723, a court assembled at Newport for the trial of pirates, and consist of William Dummer, President; Samuel Cranston, Nathaniel Pai Addington Davenport, Thomas Fitch, Spencer Phipps, John Menz and Thomas Lechmere. A similar court convened at Faneuil Hall f the trial of pirates in 1746, of which Governor Shirley was Presid

Robert Auchmuty, (Senior)
Judge of Admiralty 1733–1747
(From a portrait by Smibert)



Robert Auchmuty, Jr.
Judge of Admiralty 1767–1776
(From a portrait by Robert Feke)

In 1769 there were two trials for piracy in Boston at which the c consisted of Governor Burnett, Samuel Hood, Commodore of the s on this station, Lieutenant Governor Hutchinson, Judge Auchmuty the Admiralty Court, Andrew Oliver, Secretary of the Province, Ro Trail, Collector of the Port of Portsmouth and John Nutting, Colle of the Port of Salem. The prisoners in the cases last mentioned, were represented by John Adams, claimed the right of being tried jury, but the court refused the application, and in one case the pris was acquitted, and in the other he was discharged as the court divided, four being in favor and four against convicting him."

NOTE: The judges of the Court of Vice Admiralty appear to have been as follows: Wait Wi 1699–1701; William Atwood, 1701–1703; Roger Mompesson, April 1703–December 1703, then the n district was divided and Judge Mompesson took over New York and the other portions, leaving chusetts, New Hampshire and Rhode Island. Nathaniel Byfield was appointed for those three colon held office from December, 1703 until 1715. He was succeeded by John Menzies, a Scotchman, from 1728. Byfield was reappointed in 1728 and served until his death in 1733. He was succeeded by Auchmuty, who held office until 1747 when he was superseded by Chambers Russell, who served fro until his death in 1766. In 1767, Robert Auchmuty, the younger, was appointed and served until th lution, when, being a zealous Loyalist, he left for England in 1776. Byfield also served as Chief of the Court of Common Pleas for Bristol County most of the time from 1685 to 1725. He was of the House of Representatives in 1693 and 1698, Judge of probate for Bristol County 1702 to 17 Chief Justice of the Common Pleas for Suffolk County 1731. He seems to have been quite an office

THE NEED OF COMMON SENSE IN CONSTITUTIONAL INTERPRETATION—THE MEANING OF THE WORD "PAUPER" IN THE THIRD AMENDMENT.

The legal advisers of cities and towns may be interested in the following discussion:

To the Editor of The Herald:

This morning's issue of The Herald refers to an opinion of the city solicitor of Lynn in regard to the effect of receiving aid from the state, city or town on the right to vote. The headlines contain a somewhat sensational suggestion that 50,000 persons who are receiving such aid in the commonwealth might be disfranchised. It is stated that the city solicitor did not deal with the question under the old-age assistance act of 1930, but your reporter states that "from the reasoning of his opinion, it would appear that all citizens receiving aid through this recent legislation would be likewise disenfranchised."

I do not agree with this view. It is true that the constitution excepts "paupers" from those who have the right to vote for Governor, Lieutenant-Governor, senators and representatives. But the word "pauper" has been used for generations in varying senses and appears to be one of those words which is capable of a certain amount of definition by the Legislature, just as the word "intoxicating" in the 18th amendment has been defined quite broadly by act of Congress.

It is true that in an advisory opinion of the justices in 1832, the word "pauper" was stated to mean a person "receiving aid and assistance from the public under the provisions made by law for the support and maintenance of the poor" (see 11 Mass., p. 550; 124 Mass., p. 597). Doubtless with this opinion in mind, the Legislature, when it adopted the old-age assistance act, c. 402 of 1930, broadening the law of public assistance to include

> ". . . assistance to deserving citizens in need of relief and support 70 years of age or over who shall have resided in the commonwealth not less than 20 years"

specifically provided that

> "No person receiving assistance hereunder shall be deemed to be a pauper by reason thereof."

Accordingly, the Legislature has already limited the word "pauper" for the guidance of all persons, including the registrars of voters, in such a way that it does not apply to the deserving aged citizens for whom assistance is provided under the old-age assistance act.

This exclusion by the Legislature of these deserving aged persons from the meaning of the word "pauper" seems within the power of the Legislature to adopt "reasonable laws" (see Constitution, c. 1, s. 1, art. 4). I believe that such persons need not be disturbed about their right to vote, nor do I believe that the receipt of some temporary assistance during emergencies like the present classifies every one receiving such assistance as a "pauper" within the constitutional meaning of the word, nor does it apply to persons who receive assistance from private charity.

So far as I am aware, there has been no practical difficulty for the past 200 years in applying the word "pauper" in some practical way which has been accepted in the various communities as reasonable. I doubt very much whether there is any more difficulty about it now than there has been in the past. I doubt if there is any occasion for the "consternation" which, your reporter says, is felt by political leaders and welfare officials. If the Legislature considers it necessary to restrict the definition of the word "pauper" to shiftless or incompetent persons who are habitually public charges, I believe that the Legislature has the power to do it without amending the constitution, but I should doubt whether there were any sufficient occasion even for legislation. Perhaps the common sense in applying the law which appears to have been used for a good many years in this matter is all that is needed.

Boston, Feb. 5. F. W. GRINNELL.

NOTE.

The word "pauper", from the Latin adjective meaning "poor", appears from the Oxford dictionary to have originated about 1495 when the act II, Hen. VII, c. 12 "to admit such persons as are poore to sue in forma pauperis", was passed. This act allowed them to sue or defend in court without paying costs. Later a more limited use developed as applied to a person in receipt of poor-law relief, commonly in an almshouse, and thus the popular understanding of the word came to imply shiftlessness or incompetence. The modern methods of helping the deserving poor do not require the extension of the humiliation involved in the popular use of the word. F. W. G.